THE

REPORTS

Of the moſt Learned

Sir Edmund Saunders Knt.

Late Lord Chief Juſtice of the

King's Bench,

OF SEVERAL

PLEADINGS and *CASES*

IN THE

Court of KING'S BENCH, in the Time of the Reign of His moſt excellent MAJESTY King *CHARLES* the Second.

In Two Volumes.

With three TABLES: The Firſt of the NAMES of the CASES; The Second of the MATTERS contained in the PLEADINGS; And the Third of the Principal MATTERS contained in the CASES.

VOL. I.

In the *SAVOY:*

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Anno Regni Regis Car. II. 18.

Jevens *againſt the Adminiſtrators of* Levemere.

THE Plaintiff brought an Action of Debt for Rent againſt the Defendants *Harridge* and *Johanna* his Wife, as Adminiſtrators of one *Reve Levemere*, and declared, That he the 26th of *November*, *Anno 15 Regis nunc*, by Indenture demiſed to the ſaid *Reve Levemere* in his Life-time, *unum Meſuagium cum pertin' in Paroch' Sci. Martini in Campis in Com. Middſ. habend.* from the Feaſt of *Chriſtmas* then next, for ſeven Years, at the yearly Rent of 20 *l.* payable at the four uſual Feaſts, by equal Portions; by Virtue of which Demiſe the ſaid Inteſtate *Levemere*, after the Feaſt of *Chriſtmas*, enter'd and was poſſeſſed, and afterwards *ſcilicet ultimo die Septembris Anno Regis nunc* 17, died Inteſtate ſo poſſeſſed; and that afterwards, *ſcilicet* the ſame Day, Adminiſtration was granted to the Defendant [7] *Johanna*, by Virtue whereof both the Defendants enter'd and were poſſeſſed in the Right of the ſaid Defendant *Johanna*, as Adminiſtratrix, *&c.* and being ſo poſſeſſed, the Plaintiff ſaid, That 10 *l.* of the ſaid Rent for half a Year ending at *Lady-day* next before the bringing of the Action, were in Arrear and unpaid; and for this Money the Plaintiff brought his Action in the *Debet & Detinet*. [7]

1 Sid. 308, 309. 2 Keb. 102, 116, 118.

The Defendants pray'd *Oyer* of the Indenture, which is enter'd *in hæc verba*, as before appears, and thereupon they pleaded the Statute of 32 *H.* 8. *cap.* 6. whereby it is enacted, *That all Leaſes of any Dwelling-houſe or Shop within this Realm, or any the King's Dominions, made to any Stranger, Artificer, or Handicraftman, born out of the King's Obeiſance, not being Denizen, from and after the Feaſt of St* Michael *next coming, ſhall be void, and of none Effect.* And the Defendants further ſaid, That the ſaid Inteſtate *Levemere*, at the Time of the ſaid Demiſe, was a Stranger, and an Artificer, born out of the King's Obeiſance, and not made a Denizen, *viz.* at *Paris* in the Kingdom of *France*; and ſo they ſaid, That the Leaſe *virtute Actus predict'* was void, and of none Effect; upon which Plea the Plaintiff demurr'd.

The Exception that was taken to the Plea was, That the Defendants had not averr'd, that the Meſſuage demis'd was a Manſion-houſe, for the Act of Parliament intended only to provide, That Alien Artificers ſhould not harbour here, to have a Houſe or Shop for the publick Exerciſe of their Trades, to the Prejudice and Impoveriſhment of the King's natural Subjects, exerciſing the ſame Trades: But if Alien Artificers will live like Gentlemen on their Eſtates, they may, and in ſuch Caſe they may take Leaſes of Stables, Coach houſes, and other convenient Houſes, to lay up their neceſſary Goods; and that is not within the Words, nor the Intention, becauſe it is not within the Miſchief of the Act: Then in this Caſe the not averring the Meſſuage to be a Manſion houſe, hath made the Plea ill,

 becauſe

becauſe before the Statute was made, all Leaſes to Aliens were good, (at leaſt between the Parties) and now the Statute makes no Leaſes void but of Shops and Dwelling houſes; and if it do not appear that this is a Manſion houſe, then it is not void by the Statute, and conſequently it remains at Common Law; and although it is called a Meſſuage in the Leaſe, yet that don't prove it to be a Manſion-houſe: For in a *Præcipe quod reddat* a Man may demand a Stable, or a Barn, by the Name of a Meſſuage, for there's no other Name appointed in the Regiſter to demand 'em, but by the Name of a Meſſuage; and in 13 *Aſſ. pl.* 2. a Chapel was demanded by the Name of a Meſſuage, and the Writ well brought, and the Plaintiff there recover'd: Then (if they may be demanded by the Name of a Meſſuage in a *Præcipe*, which ought to be [8] formal according to the ſtrict Rules of Law) *a fortiori* they may paſs in a Leaſe by the Name of a Meſſuage, which is a Contract between the Parties, which the Law more favours, and don't require ſuch preciſe Words as in a Writ, but takes it according to the Intent of the Parties; but in this Caſe the Words in the Leaſe are as proper as in a *Præcipe*, and thereby a Barn or Stable may paſs; *& non apparet*, Whether the Meſſuage mention'd in the Leaſe was a Barn, Stable, Chapel, or a Dwelling-houſe; and therefore the Plea is ill by Reaſon of the Uncertainty.

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And *Twyſden* and *Wyndham* Juſtices were of that Opinion; but *Kelynge* Chief Juſtice held, That the Meſſuage ſhall be intended a Manſion-houſe *prima facie*, and that the Plaintiff ought to have replied, That it was not a Manſion-houſe, and by this Means the Point would come in Queſtion. *Moreton* Juſtice *hæſitavit*: * It was alſo objected, That no Place was laid where the ſaid *Levemere* was an Alien and an Artificer: But to that the Court anſwered, That it ſhall be try'd where the Writ was brought; and afterwards the Defendants believing the Judgment of the Court would be againſt 'em, paid the Plaintiff his Rent and Charges, as *Pawlet* the Plaintiff's Attorney inform'd me, and ſo no Judgment was given. *Saunders* of Counſel for the Plaintiff.

* 6 Co. 47. b. Co. Lat 161. a. 1 Sid. 357. 7 Co. 26, 27. 2 Reb. 98, 315. 1 Leon. 78, 79. Cart. 50.

The ſame *Jevens* againſt *Harridge* and his Wife, Adminiſtratrix of *Levemere*,

Trin. 18 *Car.* II. *Rot.* 149.

DEBT on a Bond made by the Inteſtate, ſhewn before in Court; the Defendants prayed *Oyer* of the Bond, *& eis legitur*, and then they craved *Oyer* of the Condition of the Bond, *& eis legitur in hæc verba*. The Condition, *&c.* And it was for performing of Covenants in an Indenture made between the Plaintiff and the Inteſtate; and after *Oyer* of the Condition, the Entry on the Roll was, That the Defendants demanded *Oyer* of the Indenture mentioned in the Condition which was not brought into Court, *& eis legitur in hæc verba* ſi. *This Indenture*, &c. and ſet forth the whole Indenture in *Engliſh*, by which it appear'd that the Plaintiff had demis'd a Meſſuage to the Inteſtate for a Term of Yeats yielding Rent, and the Inteſtate covenanted to pay *prout in caſu ultimo precedente*, and thereupon the Defendants pleaded the ſame Plea as before; but in this Plea they averr'd, That the Meſſuage was a Dwelling-houſe, to which Plea the Plaintiff demurr'd.

3 Mod. 94. 2 Keb. 315. 1 Sid. 357.

And the Exception was, becauſe the Defendants had pray'd *Oyer* of the Indenture which the Plaintiffs had not brought into Court, nor did it appear to be in Court *omnino*, for the Plaintiff had only brought the Bond into Court, but no Indenture: For the [9] Defendants ought to have brought the Indenture into Court to defend themſelves; but here no Indenture appears to be in Court, and then the praying *Oyer* is frivolous and idle, and the Court ought to take no Notice of it, but regard it only as the impertinent Entry of the Clerk; and when the Deed is not in Court, no *Oyer* can be grant-

[9]

ed, as in 11 *H.* 4. 11. & 44. *Br. tit Oyer del Records, &c.* 8. The Defendant in Common Pleas can't have *Oyer* of the Record of a Judgment in the Court of *Kingſton* upon *Hull*, becauſe it was not in the ſame Court of Common Pleas, but remain'd in the inferior Court; and it was further objected, That by this Means the Plaintiff will be trick'd; for ſuppoſe the Defendants have miſrecited the Indenture, or have left out any of the Covenants, or perhaps have ſet forth another Indenture between the Parties, to which the Condition was not intended to refer; the Plaintiff is foreclos'd of his Replication, for he can't ſay *non eſt factum*, becauſe the Defendants have not alledged it to be the Plaintiff's Deed, but only crav'd *Oyer* of the Indenture mentioned in the Condition, which may as well be the Deed of the Defendant's Inteſtate under his Seal, as the Plaintiff's Deed; and if ſo, then the Plaintiff can't plead *non eſt factum*, becauſe 'tis not charged to be his Deed

But it was argu'd, That the Defendants ought to have brought one Part of the Indenture under the Plaintiff's Seal into Court, and ſhewn in what Place 'twas made, and ſet forth the whole Subſtance thereof in *Latin*; and then if they had miſ-recited it, or pleaded a falſe Indenture, the Plaintiff might have pleaded *non eſt factum*, or he might have prayed *Oyer* of it, and caus'd the Indenture to be truly enter'd, and thereby reliev'd himſelf againſt the Defendants Fallity.

But notwithſtanding (it being on a general Demurrer) 'twas adjudged, That the Plea was good in Subſtance, altho' it was not formal; for it ſhall be intended to be the true Indenture, and that it is in Court, tho' it don't appear ſo by the Record; and if the Defendants had endeavour'd to trick the Plaintiff, he might have help'd himſelf by complaining to the Court. But the Court agreed, That by the Law the Defendants in this Caſe ought to have ſhewn the Deed, and not the Plaintiff, * tho' the Court will ſometimes compel the Plaintiff to give the Defendant a Copy of the Indenture, if he ſwears he never had a Part, or that he hath loſt it; but it is *ex gratia Curiæ*, and not *ex debito Juſtitiæ*; † for the Entry always ſuppoſeth it to be brought into Court by the Defendants. ‖ But they held, That this Manner of Pleading was aided by the Statute of 27 *El. cap.* 5. on the general Demurrer, tho' 'twould be otherwiſe on a ſpecial one: And Judgment was given for the Defendants. *Quod querens nil capiat per Billam.* Vide 7 *H.* 4. 1. [10] That the Plaintiff in ſuch Caſe ought to ſhew the Indenture? But this ſeems not to be Law now. *Saunders de conſilio cum Querente.* [10]

* Cro. Jac. 429 pl. 5. 1 Keb. 127. pl. 44. 1 Sid. 50. pl. 13. † Salk. 498, 499. ‖ Hob. 233. Lut. 1353, 1355.

[13] *Haws* againſt *Planner.* [13]

Trin. 17 Car. II. *Rot.* 952.

TRreſpaſs of Aſſault and Battery. The Plaintiff declar'd, That the Defendant 4 *Septemb. Anno Regis nunc* 16 *in ipſum Quer. apud Wokingham in Com' Berks inſultum fecit & ipſum verberavit, vulneravit & maletractavit, Ita, &c. & alia enormia. &c.* The Defendant *quoad* the *Vi & Armis*, and wounding, pleaded *Non culp.* and to the Reſidue he pleaded, That before, and at the Time of the Treſpaſs ſuppos'd to be committed, he was one of the Church-wardens af the Church of *Wokingham* aforeſaid, and that the Plaintiff being an Inhabitant within the ſaid Pariſh *ante pred' tempus quo, &c. ſcil't* 21 *die Auguſti Anno ſupradict.* (being *Sunday*) *fuit in Eccleſia pred' tempore Divini Servitii in eadem* [14] *Eccleſia celebrat'*, and that the Plaintiff *tempore quo Preces in eadem Eccleſia per Congregationem populi ibidem fuer. fact. irreverenter habuit caput ſuum co-opertum cum galero ſuo*; whereupon the Defendant deſired the Plaintiff to be uncovered, which he refuſed; and upon that the Defendant *cepit à capite querentis galerum ſuum, Et ei adtunc & ibidem deliberavit, Quæ quidem captio eſt eadem inſult' verberatio & maletractatio unde, &c.* and travers'd that he was Guilty *de inſult' verberatione & maletractatione pred' 26 die Auguſti ſeu ad aliquod aliud tempus quam pred' 21 die Auguſti aut aliter ſeu aliquo alio modo*; and thereupon the Plaintiff demurred; and it was objected, That the [14]

1 Sid. 301. 1 Lev. 196. 2 Keble 124. 1 Mod. 168.

the Defendant had travers'd the Day where it was not material, for he might have juſtified on the ſame Day the Plaintiff complain'd without any Traverſe: The Defendant alſo had not juſtified any Battery, becauſe the *taking off* the Plaintiff's Hat was no Battery, and therefore the Plea was ill: But the Court took it to be a great Miſdemeanor in the Plaintiff, and gave Judgment againſt him without any Regard to the Objections. *Saunders 1 Conſilio cum quer.*

[20]

[20] *Bennet* againſt *Filkins.*

1 Lev. 192. 2 Keb 94, 105.

DEBT. The Plaintiff declar'd on a Bond for 200 *l.* enter'd into by the Defendant to the Plaintiff, *per nomen Johannis Bennet Ar. Ballivi libertatis Decani & Capituli Eccleſiæ Collegiatæ beati Petri Weſtm. dat.* 6 *Febr. Anno Regis nunc* 17. The Plaintiff pray'd *Oyer* of the Condition, which is, That if one *Kingwell* appear'd *coram Rege apud Weſtm' die Sabbati prox' poſt Octab. Pur. beatæ Mariæ ad reſpond' W. Bolton Mil. & Jacobo Bradſhawe de placito tranſgreſſion' ac etiam Billæ, &c. pro* 90 *l.* then the Bond to be void, *&c.* To which the Defendant pleaded the Statute 23 *H.* 6. *cap.* 10. of Sheriff's Bonds; and further ſaid, That the Plaintiff was Bailiff of the Liberty aforeſaid, and that before the making the Bond *ſcil't Termino Sancti Hillarii Annis* 16 *&* 17 *Regis nunc* the ſaid *Bolton* and *Bradſhawe* ſued out a Bill of *Middleſex* againſt the ſaid *Kingwell*, returnable *die Veneris prox' poſt Octab. Pur.* and that the Sheriff made a Warrant thereon to the Plaintiff, then Bailiff of the Liberty, according to the ſaid Bill of *Middleſex*, by Virtue whereof the ſaid Plaintiff arreſted the ſaid *Kingwell*, *ac ipſum in cuſtodia ſua ex cauſa prædicta habuit & detinuit*: And that the ſaid *Kingwell* being ſo in his Cuſtody, the Defendant *ſimul cum* one [21] *Inch* and the ſaid *Kingwell*, enter'd into the ſaid Bond *ſub Conditione prædict' pro eaſiamento & favore eidem Kingwell de Impriſonamento ſuo prædict' monſtrand' & pro deliberatione ſua abinde habend'*; which Bond the Plaintiff accepted *colore Officii ſui prædict' & contra formam Statuti prædict'*: And ſo the Defendant ſaid, That the Bond taken in the Form aforeſaid *Vigore Statuti prædict'* was void and of none Effect; and pray'd Judgment if he ſhould be charged by this Bond. The Plaintiff replied, That the ſaid *Bolton* and *Bradſhawe* in the ſaid *Hillary* Term ſued out a Bill of *Middleſex* againſt the ſaid *Kingwell* returnable *die Sabbati prox' poſt Octab. Pur.* according to the Condition of the Bond, whereupon the Sheriff made his Warrant accordingly to the ſaid Plaintiff (being Bailiff) *virtute cujus* the Plaintiff took the ſaid *Kingwell*; And the Plaintiff further ſaid, That the ſaid *Kingwell* at the Time of the Bond made *fuit in priſona ſub Cuſtodia* of the Plaintiff, *adtunc Ball' libertatis prædict' virtute Warranti illius & non Virtute Warranti præd' in placito Defendentis ſpecificat', Et hoc, &c. unde, &c.* The Defendant rejoin'd *ut prius*, That the ſaid *Kingwell tempore confectionis ſcripti obligatorii præd' fuit in priſona ſub Cuſtod. Queren' virtute Warranti præd' in placito præd. Defendentis ſpecificat. abſque hoc* that the ſaid *Kingwell fuit in priſona ſub cuſtod' querentis virtute Warranti præd. in replicatione querentis ſuperius mentionat. prout* the Plaintiff had alledged, *Et hoc, &c. unde, &c.* To which Rejoinder, the Plaintiff demurred ſpecially, for that the Defendant had taken a Traverſe after a Traverſe: And it was argued by *Wylde* Serjeant for the Plaintiff, That the Defender's Rejoinder was ill, becauſe he had taken a Traverſe after a Traverſe; For the Plaintiff had replied, That the ſaid *Kingwell* was in Cuſtody by Virtue of a Warrant returnable *die Sabbati prox' poſt Octab' Pur.* which was right according to the Condition of the Bond; *Et non Virtute Warranti Retornabile die veneris prox' poſt Octab' Pur.* as the Defendant had pleaded, and that was a Traverſe on which the Defendant ought to have taken Iſſue, and not to traverſe over as here he hath done: And he put ſeveral Caſes where there ſhall be no Traverſe after a Traverſe taken by the other Party, as 27 *H.* 8 *fo.* 2 *b.* and *Digby* and *Fitzherbert*'s Caſe, *Hob.* 103. And here he ſaid, That the Plaintiff in his Replication had travers'd the Warrant returnable *die veneris*; And therefore the Defendant in his Rejoinder can't traverſe the

(21)

Plow. Com. 66. a.

Warrant returnable *die Sabbati*; and ſo he concluded, That the Rejoinder was ill. *Saunders* for the Defendant argu'd, That the Rejoinder was good; and firſt he denied that the Plaintiff had taken any Traverſe in his Replication, for the Plaintiff only ſaid, That the ſaid *Kingwell* was in Priſon by Virtue of the Warrant returnable *die Sabbati*, and not by Virtue of the Warrant returnable [22] *die Veneris*, which was no Traverſe but a direct Negative. (22) And the Plaintiff had relied on his Affirmative Matter before, and had not travers'd *omnino*; for the proper Words of a Traverſe are *Abſque hoc*, which are not in the Plaintiff's Replication; and ſo he hath not taken any Traverſe: But the Court did not much regard it. Then he argu'd, That the Traverſe in the Defendant's Rejoinder was good, notwithſtanding the Plaintiff had taken a Traverſe in his Replication; And he agreed the Rule that a Traverſe ought not to be taken after a Traverſe, but he took the Difference to be where the firſt Traverſe is good, and taken in a material Point and goes to the Subſtance, then there ſhall be no other Traverſe taken afterwards; but where the firſt is idle and not well taken, nor pertinent to the Matter, but of what was ſufficiently confeſs'd and avoided before, there the other Party may take a Traverſe after ſuch an immaterial Traverſe taken before; and for that he relied on the Caſe of *Digby* and *Fitzherbert* before-cited. Then here the Defendant hath pleaded, That *Kingwell fuit in priſona virtute Warranti retorn' die Veneris*; and ſo the Condition of the Bond not being purſuant to the Warrant was void; whereupon the Plaintiff in his Replication hath ſhewn, That he was according to the Condition in Priſon *virtute Warranti retorn' die Sabbati*, which was according to the Condition of the Bond; then the Plaintiff hath fully confeſs'd and avoided the Defendant's Plea; for if *Kingwell* was in Priſon by Virtue of the Warrant alledged by the Defendant, yet if he was alſo in Priſon by Force of the Warrant alledged by the Plaintiff, the Bond was good and not void; and ſo it was not material for the Plaintiff to traverſe the Warrant alledged by the Defendant, which the Plaintiff had ſufficiently confeſs'd and avoided before. And he further ſaid, That if Iſſue ſhould be join'd on the Traverſe offer'd by the Plaintiff, it would be a Jeofail at Common Law; for ſuppoſe it be found that *Kingwell* was in Priſon *virtute Warranti retorn' die Veneris*, yet at Common Law the Court could not proceed to Judgment for the Defendant, becauſe it don't appear but that he might alſo have been in Priſon *virtute Warranti retorn' die Sabbati*, by Reaſon 'tis ſo pleaded, and not denied by the other Side, and ſo the Bond is good: And tho' perhaps it will be aided at this Day by the Statute of Jeofails, yet the Defendant is not obliged to take ſuch Iſſue any more than he was at Common Law. He likewiſe ſaid, That Iſſue ſhall be taken on the moſt material Point, and for that he cited *Helliar*'s Caſe, *Co.* 6. 24. *b.* But the moſt material Point here was the Warrant returnable *die Sabbati*, which was the right Warrant; for on an Iſſue joined thereupon a Verdict found the one Way or the other on ſuch an Iſſue determines the Matter: For if it be found that the ſaid *Kingwell* was in Priſon by Virtue thereof, the Bond is good; and if it be found that *Kingwell* was not in Priſon by Force thereof, then the Bond is [23] void. And [23] he alſo put the Caſes of 41 *E.* 3. *Repl.* 59. *Dyer* 171. *Cro. Carol.* 384. Treſpaſs for breaking the Plaintiff's Cloſe: The Defendant ſaith 'tis his Freehold; if the Plaintiff entitles himſelf to a Term for Years, he need not traverſe the Defendant's Freehold, becauſe he hath ſufficiently avoided it; and the Plea and Replication may well ſtand together, by Reaſon both may be true, and ſo he concluded the Rejoinder good. And for theſe Reaſons *Twyſden* and *Wyndham* Juſtices were of the ſame Opinion, *Moreton* Juſtice *abſente*: But *Kelynge*, Chief Juſtice was of Opinion, That the Rejoinder was ill, by Reaſon he took it to be but one Warrant, and that the Parties differ'd in the Return of it; and then the Plaintiff alledging it to be returnable at another Day than the Defendant had pleaded, he did well to traverſe the Return, which the Defendant had before alledged, on which Traverſe the Defendant ought to have taken Iſſue, and not traverſe over. Afterwards in the ſame Term, the Matter was argued again by *Pemberton* for the Plain-

Hob. 80, Co. Lit. 282 b. Poph. 101. Mo. 350. Pl 162. Cro. E. 99. Pl 1. 401. pl. 18, 418. pl. 13. Lut. 1435, 1437. Hawk. P. C. cap 77. ſect. 5.

 tiff,

tiff, and *Joner* for the Defendant, to the ſame Intent as before; And *Twyſden*, *Wyndham* and *Moreton*, Juſtices, delivered their Opinions *ſeriatim* for the Defendant, That the Rejoinder was good, *Kelynge* Chief Juſtice *abſente*; but at the Inſtance of the Plaintiff's Counſel, the Court gave him Leave to diſcontinue his Action on Payment of Coſts, tho' it was after they had delivered their Opinion. *Note*, That *Saunders*, who was of Counſel with the Defendant, thought the Plaintiff would have objected to the Manner of the Traverſe, by Reaſon the Defendant travers'd, *Abſque hoc* that *Kingwell* was in Priſon *virtute Warranti*, that the *Virtute* ought not to be travers'd; but it was not moved.

Lut. 627, 631.

That it is good, *Vide Hob.* 52, *Foſter* and *Jackſon*'s Caſe, 9 *H.* 6. 14. & 20.

[27] Earl of *Mancheſter* and others againſt *Vale*.

TReſpaſs. The Plaintiffs declar'd, That the Defendant 29 *Septembris Anno Regni Regis nunc* 17. broke the Plaintiff's Cloſe called *Marking* and *Yondermore* in the Pariſh of *Weſtmarke* in the County of *Somerſet & herbam ibidem pedibus ambulando conculcavit & al. herbam ibidem cum Averiis, viz. Equis bobus vaccis porcis & bidentibus depaſtus fuit* with a *Continuando, &c.* The Defendant as to the *Vi & Armis* and the Treſpaſs *cum porcis* pleaded *Non culp'*; and to the Reſidue of the Treſpaſs, he pleaded in Bar, That Sir *Thomas Bridges* Knt. was ſeiſed *de Manerio de Wedmore cum pertin. in Com. præd.* in his Demeſne as of Fee, and preſcribed in the ſaid Sir *Thomas* for Common in the Place where, *&c. pro omnibus Averiis ſuis co'icalibus*, levant and couchant on the Manor *omni tempore Anni*, as appurtenant to the ſaid Manor: And further ſaid, That the ſaid Sir *Thomas* conſtituted and appointed the Defendant to take Care of his Cattle put into the ſaid Cloſe, in which, *&c.* And alſo ſaid, That the ſaid Sir *Thomas* caus'd ſeveral commonable Cattle of the ſaid Sir *Thomas Bridges* to be put in, *quæ predicto tempore quo, &c.* were in the Place where, *&c.* and that the Defendant as Servant to the ſaid Sir *Thomas Bridges tempore quo, &c.* enter'd into the ſaid Cloſe *in quo, &c.* to ſee the ſaid Cattle *ibidem ne aliquod dampnum eis eveniret, & in intrando* he did tread down the Graſs there, which is the ſame Reſidue of the Treſpaſs, *Et hoc, &c. Unde, &c.* Whereupon the Plaintiffs demur'd in Law. And it was objected *ex parte Quer.* That the Defendant had only ſaid that the Cattle were in the Place where, *&c.* but not that he put them there. And it appears that the Cattle were not the Defendant's proper Cattle; and then if he did not put them in the Place where, *&c.* he is not Guilty, for a Man can't be guilty of a Treſpaſs with Cattle, unleſs they are his own proper Cattle, or that he actually put them in the Place where, *&c.* And here the Defendant juſtified the Treſpaſs with Cattle, and yet he hath not confeſt it, nor ſaid any Thing to ſuch Purpoſe; and [28] then the Plea being ill in Part, is ill in the whole, tho' he hath juſtified ſome Part well; for an entire Plea can't be good in Part, and ill in the other Part, becauſe ſuch entire Plea is not dividable, *Cro. Eliz.* 268, 330, 434. *Cro. Jac.* 27. And the whole Court was of that Opinion, and Judgment was given *pro Querente. Saunders e Conſilio cum Querente. Nota*, That there was another Fault in the Plea, becauſe it was not aver'd, That the Cattle were levant and couchant on the Manor: But that was not mov'd.

Salk 637. Pl 5.

[28]

1 Lut. 1492. 2 Saund. 127.

[32] *Birks* againſt *Trippet*.

Aſſumpſit. The Plaintiff declar'd that there were ſeveral Differences between him and the Defendant, for the Determination whereof, they ſubmitted themſelves to the Award of one *Barker Arbitratoris inter eos indifferenter elect. ad arbitrand. ordinand. & finaliter adjudicand. de & ſuper premiſſis*: And that the Defendant *in Conſideratione ſubmiſſionis præd. ac in Conſideratione* that the Plaintiff had promis'd the ſaid Defendant to pay him 40 *l. quandocun-*

1 Sid. 303. 2 Keb. 126.

que requiſitus eſſet, if the Plaintiff did not perform the ſaid Award to be made on his Part, *Aſſumpſit ſuper ſe* and promiſed the Plaintiff, That if the Defendant did not perform the ſaid Award to be made on his Part, then he the ſaid Defendant 40 *l.* to the ſaid Plaintiff *cum adinde requiſit. fuiſſet bene & fideliter ſolvere vellet.* The Plaintiff aver'd, That the Arbitrator made his Award, and thereby order'd the Defendant to pay the Plaintiff 10 *s* in Conſideration of Damages in an Action of Battery, and 20 *s.* more for curing a Horſe, and 10 *s.* more for curing an Ox, and 4 *l.* more for the Plaintiff's Expences at Law, and that on Payment of the ſaid Sums amounting to 6 *l.* they ſhould give each other general Releaſes, and that the Defendant ſhould deliver a Fine to the Plaintiff: And the Plaintiff averr'd, That the Defendant had not paid the 6 *l.* nor delivered the Fine according to the Award, *præd' tamen* the Defendant not regarding his Promiſe, but intending to defraud the Plaintiff of the ſaid 40 *l.* had not paid the Plaintiff the ſaid 40 *l.* according to his Promiſe, nor ſatisfied him for the ſame; and ſo concluded the Action to his Damage, *&c.* without alledging any Demand of the 40 *l.* The Defendant pleaded in Bar, That the Plaintiff was indebted to him, being an Attorney in 4 *l.* for Fees and Expences, and that before the Award made he gave Notice thereof to the Arbitrator, and offer'd to make it appear to him, and deſir'd him to allow it in his Award; but the Arbitrator made his Award aforeſaid without any Allowance or Conſideration had of the ſaid 4 *l.* notwithſtanding the Notice and Proof aforeſaid, *Et hoc, &c. unde, &c.* whereupon the Plaintiff demurr'd in Law. And it was argued by *Lindley* for the Plaintiff, That the Plea was ill, becauſe the Submiſſion was not conditional with an *Ita quod*; for if it had been ſo, perhaps the Arbitrator can't make his Award of Part of the Differences, if he had Notice of more, as *Baſpole's* Caſe, *Co.* 8. 98. *Cro. Jac.* 355 *Dyer.* 216, 242. But it appears [33] by ſome of the ſaid Books, That if the Submiſſion be not conditional, then the Arbitrators may make their Award of Part, tho' they had Notice of more, and the Award ſhall be good for ſuch Part: But he ſaid, That if it ſhould be admitted that the Submiſſion in this Caſe had been conditional, with an *Ita quod*, yet 'tis a good Award, becauſe the Arbitrator hath made his Award of all Matters, for he hath awarded general Releaſes on both Sides; and tho' the Defendant did give Notice to the Arbitrator of his Debt, yet the Arbitrator was not obliged to allow it, for he might not probably take it to be a juſt Debt, and for that Reaſon he did not allow it, and the Arbitrator was the Judge of it: And here he hath given his Judgment that the Defendant ſhall releaſe; and ſo he hath made an Award of that and all other Differences whatſoever; and the Court was of that Opinion. *Saunders* for the Defendant ſaid, He would not maintain the Plea: But he took an Objection to the Declaration, That the Plaintiff had not therein laid any Requeſt of the ſaid Penalty of 40 *l* for the Declaration is, That the Defendant promiſed to pay the ſaid 40 *l.* on Requeſt, if he did not perform the Award; and here the Requeſt is material; for he took the Difference between a meer Duty and a collateral Sum, for where a meer Duty is promis'd to be paid on Requeſt, as in Conſideration of all Moneys lent the Defendant, he promis'd to pay them again on Requeſt, there no actual Requeſt is neceſſary; but the bringing the Action is a ſufficient Demand thereof: But 'tis otherwiſe on a Promiſe to pay a collateral Sum on Requeſt, for in that Caſe there ought to be an actual Demand before the Action brought, as *Cro. Jac.* 183. *Selman* againſt *King*, 523. *Hill* againſt *Wade*, 639. *Waters* againſt *Bridges*. And here the Promiſe to pay the 40 *l.* on Requeſt is collateral, and is a Penalty and not a Duty precedent; for which Reaſon there ought to have been a Demand thereof before the bringing of the Action: And ſo was the Opinion of the whole Court. And *Twyſden* Juſtice interrupted *Saunders*, and ſaid, What makes you labour ſo? The Court is of your Opinion, and the Matter clear. And thereupon Judgment was given for the Plaintiff, *Quod Querens nil capiat per Billam.*

1 Lev. 113.

1 Cro. 200.
3 Cro. 838.
1 Rol. R. 377.
2 Rol. Rep. 23, 193.
Bridgm. 91.

[33]

1 Cro. 385.
Lut. 231.
Cro. El. 74, 85, 91, 179, 220.
Yel. 66.
2 Roll. Rep. 62.
Godb. 274. 437.
Hutt. 73, 107.
Poph. 160.
2 Vent. 74.
Savil 72.

[37]

[37] *Jones* againſt *Pope.*

1 Sid. 305. 1 Lev. 191. 2 Keb. 93. pl. 15.

DEBT on an Eſcape. The Plaintiff declar'd, That he 14 *Junii* 1654. ſued out of the then Court of Upper Bench, a Writ of *Teſtatum Capias ad ſatisfac'* againſt one *Fabian Hill*, directed to the Sheriffs *de Civitate Briſtol'*, whereby the ſaid Sheriffs were commanded to take the ſaid *Fabian Hill*, to have his Body *coram nuper pretenſo Protectore Olivero, &c.* in the Upper Bench at *Weſtminſter die Sabbati prox' poſt menſem Michaelis ad ſatisfaciend.* the ſaid Plaintiff of 1000 *l.* Debt, and 7 *l.* 6 *d.* Coſts, by Virtue of which Writ the Defendant *& quidam Thomas Bull* then Sheriffs of the ſaid City, afterwards *ſcil'* 10 *Auguſti Anno ſupradicto* within the ſaid City, took the ſaid *Fabian Hill* in Execution for the ſaid Debt and Coſts, and had him in their Cuſtody *quouſque poſtea ſcil'* 1 *Septembris Anno* 1654. aforeſaid, the ſaid now Defendant and the ſaid *Bull* being then Sheriffs, permitted the ſaid *Hill* to go at large, and ſuffer'd him to eſcape, the Plaintiff not being ſatisfied of his Debt and Coſts :) And that afterwards the ſaid *Bull* died, whereby an Action accrued to the Plaintiff to demand and have his Debt of the Defendant, being the ſurviving Sheriff; *Prædict' tamen, &c.* The Defendant pleaded in Bar, That the Plaintiff's Bill was exhibited againſt him 21 *Novemb' Anno Regni Regis nunc* 17. and that after the Cauſe of Action accrued *ſex anni & amplius elapſi fuerunt* before the Day of exhibiting the ſaid Bill, *Et de hoc, &c. Unde, &c.* On which Plea the Plaintiff demurr'd in Law. And *Jones* of Counſel for the Plaintiff argued againſt the Plea, That this Action of Debt for an Eſcape is not within the Statute of Limitations of 21 *Jac cap* 16 For the Words of the Statute are, *All Actions of Debt grounded upon any Lending or Contract without Specialty, All Actions of Debt for Arrearages of Rent* ſhall be brought within ſix Years, *&c.* And here he ſaid, This Action of Debt on an Eſcape is not within the ſaid Statute for two Reaſons; firſt, Becauſe this Action is not founded on any *Lending* or *Contract*; and the Statute don't limit all Actions of Debt generally; but only Actions of Debt founded on *Lending* or *Contract* without Specialty; and here is a Duty created by the Law without any *Lending* or *Contract*, and therefore 'tis not limited or reſtrained by the ſaid Statute. *Secondly*, he ſaid, That this Action of Debt on an Eſcape is founded on a Specialty, *viz.* on a Statute-Law, and ſo out of the Statute of Limitations; (a) for at Common Law, no Action of Debt lay againſt a Jaylor for an Eſcape out of Execution, but only an Action on the Caſe, as appears in *Co.* 2 *Inſt.* 383. then [38] the Statute of 1 *R.* 2. *cap.* 12. gave Creditors an Action of Debt againſt the Warden of the *Fleet* on an Eſcape out of Execution, and this Statute is conſtrued to extend to all other Gaolers and Sheriffs; (b) and ſo this Statute is a Specialty on which the Action is founded; and ſo 'tis clearly out of the Words and Intention of the ſaid Statute of Limitations; which only limits Actions of Debt without Specialty: And he likewiſe ſaid, That although the Words of the Statute of Limitations are general as to the Limitation of all Actions of Debt for Arrearages of Rent, yet it hath been adjudged, that an Action of Debt for Arrears of Rent reſerv'd by Indenture, was not within the Meaning of the ſaid Statute. *Hutton's Rep* 109. *Freeman* and *Stacie's* Caſe. (c) And ſo he ſaid it had been adjudged on the Statute of 2 *E.* 6. *cap.* 12. of Tithes, That an Action brought on that Statute was not within the Statute of Limitations, becauſe it was founded on a Specialty, *viz.* the ſaid Act of 2 *E.* 6. *Cro.* 15 *Car.* 513. *Talory* and *Jackſon's* Caſe; and ſo he concluded that the Plea was ill. *Saunders econtra*, and he argued that the Plea was good; and ſaid, That this Action of Debt on an Eſcape was within the Statute of Limitations, becauſe tho' 'tis not founded properly on a *Lending* or *Contract*, yet the Law hath made a Contract, and the Statute intended to limit all Actions of Debt founded on Contract without Specialty, and hath not made any Diſtinction between Contracts in Law and Contracts in Fact, but included all; and moreover that this Action is not only founded on the ſaid Statute of 1 *R.* 2. but on the Eſcape, which is a meer Matter of Fact: For altho' the Statute, and alſo the Judgment and Writ of Execution are of Record, and ſo Specialties; yet

(a) Sed Q. Et vide F. N. B. 93. E. & 45 E. 2 fo. 9. 10.

[38]

(b) Hetl. 37, 39.

And ſo it is of a Writ de rationabili parte bonor', Hutt. 109, 110. Litt. Rep. 341, 343.

And of Debt on an Award. 2 Keb. 536. Pl. 56. 1 Lev 273. 2 Saund. 64, 67.

the Eſcape on which the Action is founded is a meer Matter of Fact: For if the Action is founded on a Record, then the Defendant cannot plead *Nil debet*; for that is no Plea to a Specialty; but doubtleſs he may plead *Nil debet*, and ſo he thought that the Plea was good. (d) But for the Reaſons given by *Jones*, the Court held the Plea to be ill, and that this Action was not within the Statute of Limitations. Then *Saunders* moved an Exception to the Declaration, * becauſe the Plaintiff hath only ſhewn that he ſued out a Writ of Execution, by Virtue whereof the ſaid *Hill* was taken and eſcaped, but did not ſhew that the Plaintiff had recovered any Judgment as it ought, becauſe the Defendant might have pleaded *Nul tiel Record* to the Judgment, if the Plaintiff had ſet it out, as appears in Dr. *Drurie*'s Caſe, *Co.* 8. 142. But by this Declaration the Defendant was ouſted of ſuch Plea: For ſuppoſe the Judgment had been afterwards and before this Action revers'd, then this Action is gone, as appears by the ſame Book; and it ought in this Caſe to be taken, that there was a Writ of Execution without any Judgment; and if ſo, [39] tho' the Sheriff ſhall be excuſed for executing the ſaid Writ, becauſe he is not to examine the Act of the Court, and perhaps ſhall be fin'd for the Eſcape as a Contempt to the Court in not obeying the Proceſs thereof, and doing his Duty; yet the Party cannot bring any Action of Debt againſt him for the Eſcape, becauſe there was no Debt or Duty due to the Plaintiff; and the whole Court was of that Opinion; but then the Plaintiff prayed Leave to diſcontinue his Action; which was granted him on Payment of Coſts, *&c.*

(d) 1 Sid. 305, 306. 1 Lev. 191. 2 Ke6. 93. Pl. 15.

* 2 Cro. 11. 3 Cro. 877. 2 Rol. R. 282.

[39]

[40]

[40] D E

Term. Sancti Hill.

Annis regni Regis Car. II. 18 & 19.

[47] *Barker* and his Wife againſt *Thorold.*

[47]

COvenant. The Plaintiffs declared, That by Articles of Agreement tripartite, made 28 *Aprilis An Reg. Regis nunc* 17. between the Defendant of the firſt Part, one *John Cowper* of the ſecond Part, and the Plaintiffs of the third Part; reciting that [48] Sir *Bethel Wray* was found a Lunatick by Inquiſition, and that the Cuſtody of his Perſon and Eſtate was committed to the Plaintiffs, (the Wife being the Lunatick's Siſter) and that the ſaid *John Cowper* had alſo obtained a Grant of the Cuſtody of the Perſon and Eſtate of the ſaid Lunatick; whereupon ſeveral Articles of Agreement were made between the ſaid *Cowper* and the ſaid Defendant, who had married *Griſild* another Siſter of the ſaid Lunatick; and thereupon ſeveral Differences aroſe between them: To the End therefore that the ſaid Differences might ceaſe, it was agreed between the Parties, that the Articles with *Cowper* ſhould be obſerv'd and perform'd; and the Defendant in Conſideration of his *Labour and Charges in Letting and diſpoſing* the Lunatick's Eſtate, and in Conſideration of Repairs and Taxes, ſhould have and receive to his own Uſe the Profits of certain Parcels of the Lands; and if the Charges ſhould exceed 15 *l. per Annum*, then they ſhould be equally born by the Plaintiffs and Defendant, and that all the Profits of the Reſidue of the

2 Keb. 145.

[48]

Land, (*Cowper*'s Allowance being firſt paid and ſatisfied) ſhould be equally divided between the Plaintiffs and the Defendant; *Ac tam cito quam* the Lands out of which the Profits accrued *equalit' & indifferent' eſtimari & computari potuiſſent*, the Defendant ſhould have one Moiety and the Plaintiffs the other to their own Uſe; and that the Plaintiffs within a Term next after the ſettling of the Moiety of the Profits of the Eſtate as aforeſaid, ſhould give Security to the Lord Chancellor for their Accompt of ſo much of the Profits as they ſhould receive, with the uſual Condition in ſuch Caſes. Then the Plaintiffs ſet forth the Articles with *Cowper in hæc verba*, whereby the Defendant was to pay *Cowper* 400 *l. per Annum* for the ſaid Lunatick's Maintenance, and if the Daughter of Sir *John Wray* died, then to pay *Cowper* 300 *l. per Annum* more. Then the Plaintiffs aſſigned a Breach, That the Defendant 18 *May Anno Regni Regis nunc* 18. received 800 *l.* out of the Profits of the Eſtate (the Allowance to *Cowper* being paid, and the Charges deducted and allowed to the Defendant according to the Articles) and that the Defendant had not render'd an Accompt to the Plaintiffs of the Profits, nor paid the Moiety of the ſaid 800 *l.* ſo received, *licet* he had been requeſted, *&c.* The Defendant pleaded in Bar, and confeſſed that he had received the 800 *l.* but ſaid, That before the Receipt of the ſaid 800 *l.* he had expended *in & circa reparationem premiſſorum & alia onera neceſſaria* the Sum of 810 *l* wherefore he retain'd the 800 *l. erga ſatisfact'* of the 810 *l.* by him ſo expended: *Et ratione inde non reddidit aliquod compotum* to the Plaintiffs; on which Plea the Plaintiffs demurred in Law. And *Winnington pro Quer'* argued, That the Plea was ill for two Reaſons, [49] *Firſt*, [49] Becauſe there was no Clauſe in the Articles which authoriſed the Defendant to expend above 15 *l. per Annum* in Charges, and to pay *Cowper* his Allowance; for if the Charges were more, the Plaintiffs were to pay a Moiety; and therefore the Defendant is not obliged to expend it unleſs the Plaintiffs will pay the Moiety. And *Secondly*, on which he chiefly relied, That the Plea was uncertain, becauſe the Defendant ſaid, That he had laid out 810 *l. circa reparationem & alia onera neceſſaria*, * and did not ſhew what thoſe neceſſary Repairs were, ſo that it might appear to the Court whether they were neceſſary or not; and for this Uncertainty he ſaid the Plea was ill. *Saunders* of Counſel with the Defendant, took an Exception to the Declaration, and ſaid, That there were two Breaches aſſigned, *viz.* the not rendring an Accompt, and the Non-payment of the Moiety of the 800 *l.* And as to the not rendring an Accompt, it ſeemed to him that the Breach was not well aſſigned, by reaſon it did not appear that the Plaintiffs had aſſigned Auditors to audit the Defendant's Accompt; and then he cannot make any Accompt for want of Auditors, and he was not obliged to accompt before the Plaintiffs; but he cited the Books of 45 *E.* 3. 14. *b.* 7 *H.* 4. 14. *b.* 34 *H.* 6. 43. *b.* 4 *E.* 4. 6., whereby it appears, That if the Defendant of his own free Will accompts before the Plaintiff himſelf, the Accompt ſhall be good; but the Defendant is not by Law compellable to accompt before the Plaintiff himſelf, for then the Plaintiff will be *Judex in propria cauſa*. And therefore he held the Declaration ill in this Point. And as to the Payment of the Moiety of the 800 *l.* he ſaid, That the Defendant was not obliged to pay it before the Lands were eſtimated and aſcertained, which was not averr'd to be done, becauſe by the Articles the Plaintiffs were bound within a Term after the aſcertaining (and not before) to give Security to the Chancellor for ſo much of the Profits as they ſhould receive; and here the Defendant will be anſwerable for the whole 800 *l.* to the Lunatick, tho' he pays the Moiety thereof to the Plaintiffs; and yet he hath no Remedy by the Articles to compell the Plaintiffs to give Security for their Part, by Reaſon no Aſcertainment is made; for tho' the Defendant is bound to pay immediately on the Aſcertaining the Moiety of the 800 *l.* Profits; and the Plaintiffs are at Liberty to give Security for a Term after the ſame are aſcertained, yet the Defendant was not obliged to pay the Moiety of the Profits before they are aſcertained, ſince he hath * *no* Remedy by the Articles to compel the Plaintiffs to give

* 2 Cro. 486. Pl. 5. 3 Bulſt. 31.

30 E. 3. 5. b. 39 E. 3. 5. b. 34 H. 6. 44. 21 E. 4. 66. b. Aſt. Ent. 106. Raſt. Ent. 18. Fitz. Accompt. 37. B. 16. Br. Accompt. 28. Br. Accompt. 9. Fitz. Barre 69. Br. Accompt. 75. Fitz. Accompt. 83. Lat. 59. Raym. 57.

* *This Word is omitted in the Original, which (as it ſeems) is a Miſtake of the Preſs.*

Security; and ſo the aſcertaining ought to precede the Payment, and becauſe it is not averr'd that there was any Aſcertainment, he concluded that the Declaration was ill in this Point alſo. But the Court reſolved that the Declaration was good enough; for as to the firſt Point of not rendring an Accompr, it was anſwered, That [50] perhaps the Defendant is not compellable by Law to accompt before the Plaintiffs themſelves; but in this Caſe, not the Law, but the Defendant hath obliged himſelf to accompt by his own Deed, before the Plaintiffs themſelves, which by Law he was not obliged to; and it appears by the Books above-cited, that ſuch Accompt before the Plaintiff himſelf is good; and the Defendant hath here covenanted to make ſuch an Accompt, and becauſe he hath not made ſuch an Accompt he hath broke his Covenant. And as to the ſecond Point of Non-payment of the Moiety of the 800 *l.* 'twas anſwered, That the aſcertaining was good enough by the Plaintiffs Averment that the Defendant had received ſo much Money, for no other Aſcertainment of the 800 *l.* could be made. And the firſt Clauſe of the Covenant was, That the Profits ſhould be equally divided without Reſpect to any Aſcertainment or Eſtimate whatever: And the Breach without doubt was well aſſigned thereon. And Judgment was given *pro Quer'* and a Writ of Inquiry awarded. [50]

[51] DE [51]

Termino Paſchæ.

Anno Regni Regis Car. II. 19.

[58] *Gainsford* againſt *Griffith.* [58]

DEBT on Bond dated 18 *Octobr. An. 16 Regis nunc.* The Defendant craved *Oyer* of the Condition, which is for Performance of Covenants in an Indenture of Aſſignment of the ſame Date made between the Defendant and the Plaintiff, and on *Oyer* the Defendant ſhewed the Indenture, wherein it was recited, That *Richard Pagett* Gentleman, by Indenture of Leaſe, dated 20 *Januarii* 14 *Regis nunc*, had demiſed to the Defendant a Houſe, called *The White Lion in King-ſtreet in Weſtminſter. Habend'* from the Feaſt of St. *Michael* then laſt paſt, for twenty-one Years under the Rent of 22 *l. per Annum*, and that the Defendant by his Indenture here brought into Court, in Conſideration of 28 *l.* Fine, aſſigned over his whole Term and Intereſt to the Plaintiff; and covenanted with the Plaintiff, That the ſaid Indenture of Leaſe from *Pagett* at the Time of Sealing the ſaid Indenture of Aſſignment was *bona certa perfecta & indefeſibilis dimiſſio, Anglice* a Leaſe in Law, of the ſaid Meſſuage, *& ita ſtabit & remanebit Querenti durante reſiduo* of the ſaid Term of twenty-one Years then unexpired: And that the Plaintiff, his Executors, Adminiſtrators and Aſſigns *quiete & pacifice haberet teneret & gauderet* the ſaid Meſſuage *durante toto reſiduo termini*, without any Let, Denial, Interruption or Diſturbance of the Defendant or his Executors or Aſſigns, and acquitted or otherwiſe *ſaved harmleſs* of all *Incumbrances had, made, committed, ſuffered, or done* by the Defendant (the Rent and Covenants

1 Sid. 328. 2 Keb. 76, 201, 213.

nants on the original Leaſe only excepted and forepriſed) and then the Defendant pleads Performance of all the Covenants generally.

[59] [59] The Plaintiff replies, That before the making the Indenture brought into Court, one *Thomas Townley* was ſeiſed of the ſaid Meſſuage in his Demeſne as of Fee; and being ſo ſeiſed, the ſaid *Pagett* afterwards *ſcilicet prædict'* 20 *Januarii Anno* 14 *ſupradicto* entered into the ſaid Meſſuage on the Seiſin of the ſaid *Thomas Townley*, and diſſeiſed him, and was ſeiſed in his Demeſne as of Fee *per diſſeiſinam illam*; and being ſo ſeiſed by Diſſeiſin, the ſaid *Pagett* made the ſaid Leaſe to the Defendant for the ſaid twenty-one Years, who aſſigned it over to the Plaintiff as aforeſaid: And the Plaintiff further ſaith, That the ſaid *Townley* afterwards *ſcilicet ultimo Febr. Anno* 17 *Regis nunc, &c.* entered on the ſaid Plaintiff, and turned him out of the ſaid Houſe, whereby the ſaid *Townley* was ſeiſed *in priori Statu ſuo*, and the Plaintiff's Term was extinct: And ſo the Plaintiff aſſigned for Breach, That the ſaid Leaſe from *Pagett*, at the Time of making the ſaid Indenture of Aſſignment, was not good, perfect and indefeaſible. *Et hoc, &c. Unde, &c.* On which Replication the Defendant demurr'd in Law. And the Defendant's Counſel argu'd, That the Breach was not well aſſigned, becauſe it appears, That the Plaintiff was not at all ouſted or diſturbed by the Defendant, or any claiming under him, but by *Townley* a Stranger; and the Defendant in this Caſe hath not covenanted againſt the Act or Title of any Stranger, for tho' the Defendant hath covenanted, That *Pagett*'s Leaſe was indefeaſible, yet the laſt Words, That the Plaintiff ſhall enjoy without Interruption from the Defendant, *&c.* clearly prove that the Defendant covenanted only againſt himſelf and thoſe who claim under him. And thereupon ſeveral Caſes were put, that one Part of a Sentence ſhall be reſtrained and expounded by the other, as *Dyer* 240. *b.* * A Termor for Years aſſigned his Term, and covenanted, That he had not made any former Grant, or done any Thing whereby his Aſſignment ſhould be impair'd, hinder'd or fruſtrated: (*But that*) the Aſſignee might quietly enjoy, without Diſturbance from any Perſon. There by the Opinion of three Juſtices the laſt Words, which were general, were reſtrained and limited by the former Words, which were ſpecial. So in the ſame Book, *Dyer* 255. A Condition of a Bond, That if the Obligor ſuffer the Obligee quietly to hold Lands *de anno in annum* during the Term (and that without Trouble from any Perſon.) It was adjudged that the laſt Words were expounded and limited by the former. And alſo the Caſe of Sir *George Trenchard* againſt *Hoskins*, *Winch. Rep.* 91, 92, 93. was cited, where a Man covenanted, That he was ſeiſed in Fee, and that he had good Power to ſell, and that no Reverſion was in the Crown *notwithſtanding any Act done by the Covenantor*; the laſt Words, *Notwithſtanding any Act done, &c.* reſtrained the general Senſe of both the firſt [60] Covenants. And ſo he concluded, That the firſt Covenant here ſhall be expounded and limited by the laſt, and then the Plaintiff hath aſſigned no Breach, and therefore the Replication was inſufficient. To which it was anſwered for the Plaintiff, That here the firſt Covenant that the Leaſe was indefeaſible, is not reſtrained, nor can be limited by the ſubſequent Words, yet the Caſes put on the other Side were agreed. For both the Caſes cited in *Dyer* were but one intire Sentence, and not diſtinct Covenants; and then the Conſtruction is to be made on the whole Sentence. And the Caſe in *Winch*, altho' it was not adjudged, but the Court divided in Opinion, yet it may be good Law, for there the reſtrictive Words coming at the End of the laſt Sentence may be indifferently applied to both the preceding Sentences: For the Words (*notwithſtanding any Act done, &c.*) are applicable to the Covenant that he was ſeiſed in Fee, or to the Covenant that he had Power to ſell, as well as to the Covenant that there was no Reverſion in the Crown, and the Senſe will be good and perfect. And *in iſto caſu* thoſe Words (*notwithſtanding any Act done, &c.*) were omitted at the End of the two firſt Sentences to avoid Tautology and an idle Repetition, (they, at the End of the laſt Sentence, being applicable enough to all the firſt Sentences.) *Et quod ſubintelligtur non deeſt.* And it was agreed, That a particular Covenant in a Deed may reſtrain a general Covenant in Law, as *Nyke*'s Caſe, *Co.* 4 80. But it was ſaid, That in this Caſe there was an expreſs

* Mo. 58. Cro. El. 42, 615.

[60]

expreſs general Covenant in Fact, which is not, nor can be reſtrained by any other ſubſequent Covenant, unleſs it be conſtrued as Part of the firſt general Covenant. And this Difference was taken, That if there be a reſtrictive Clauſe in the firſt or latter Part of a Sentence, or at the beginning of the firſt, or at the end of the latter Sentence, which, if applied to either, will make good Senſe, there it ſhall extend to both Sentences: But on the other Hand, if ſuch Sentence be placed in the middle of one or two Sentences, as in *Cro. Car.* 106. *Crayford* againſt *Crayford*, and 495. *Hughes* againſt *Bennet*, A Covenant that he was ſeiſed in Fee (*notwithſtanding any Act done, &c.*) and that the Lands were of the yearly Value of 200 *l.* there the Words (*notwithſtanding, &c.*) can't be applied to the Covenant concerning the Value, becauſe they were placed in the middle of the Sentence. And here the Words in the laſt Covenant (*without Interruption, &c.*) can't be applied to the Covenant that the Leaſe was indefeaſible, for then the Sentence would be inſenſible, *viz.* That the Leaſe was indefeaſible without Interruption by the Defendant, *&c.* And moreover if it was ſenſible, yet the Words (*without Interruption, &c.*) don't take away the Force and [61] Signification of the Word *Indefeaſible*, but it remains an abſolute general Covenant as before; and then the Leaſe being defeated by a Stranger, was a Breach of the Covenant, and ſo the Replication good: And the whole Court was of that Opinion, and Judgment was given for the Plaintiff. *Saunders* of Counſel for the Plaintiff. *V. Winch Rep.* 74, 87. *Napper's* Caſe, *& ibidem* 93. *Latch. Rep.* 105. [61]

[65] *Butler* againſt *Wigge.* [65]

DEBT on Bond. The Defendant pray'd *Oyer* of the Condition, which is, That if the Defendant ſhall ſtand to and abide by the Award of two Arbitrators of all Actions, *&c.* ſo that the Award be made *at or before* the 23d Day of *January, But if the Arbitrators ſhall not agree upon their Award, that then they ſhall chooſe and elect an indifferent Man, and they ſhall ſtand to his final End, Determination and Judgment, which he ſhall give and determine on and before the 2 th of* January, *under his Hand and Seal, that then this Obligation ſhall be void*, &c. And the Defendant pleaded, That neither the Arbitrators nor the Umpire made any Award or Umpirage *ſecundum formam & effectum* of the Condition of the Bond. The Plaintiff replied and confeſſed, That the Arbitrators made no Award, but ſaid that they elected an Umpire, who made an Award, That the Defendant ſhould pay the Plaintiff a certain Sum of Money in Lieu and Satisfaction of all Controverſies, *&c.* and aſſigned a Breach in Non payment of the ſaid Money, whereupon the Defendant demurred in Law. And it was objected, That the Defendant in this Caſe was not obliged to perform the Award of the Umpire, becauſe the Condition *in ea parte* was void and inſenſible; for the Words are rather directive than conditional as before appears; And 'tis likewiſe inſenſible, becauſe 'tis ſaid, *That the Arbitrators ſhall chooſe an indifferent Man, and they ſhall ſtand to his Award*; which Word (*they*) in this Caſe being in the plural Number, ſignifies the Arbitrators and not the Defendant. It alſo don't appear on what Matter the Umpire ought to make his Award; for it is not limited by the Condition to be made on the Premiſſes; ſo that the Defendant is not by the Words to perform the Award: And it will be abſurd to ſay, That the Defendant ſhall be bound by the Bond that the Arbitrators ſhall perform the Award of the Umpire; and it can't be intended that the Word (*they*) ſhould refer both to the Plaintiff and the Defendant, for then the Defendant will be bound that the Plaintiff ſhall perform the Award, which is more abſurd and againſt the Intent, that the Plaintiff ſhould have Power to make the Defendant forfeit his Bond *nolens volens*. And tho' generally if a [66] Condition is altogether inſenſible and void, the Bond ſhall be ſingle; yet in this Caſe there is a good Condition, notwithſtanding theſe Words are inſenſible, for the firſt Part of the Condition to perform the Award of the Arbitrators is good, and is a proper Condition, which is ſufficient to defeat the Obligation. And if [66] 2 Keb. 204.

the Defendant hath performed it, or is by Law excuſed therefrom, if they make no Award (as in this Caſe) the Bond is ſaved. And by Reaſon the Words are deficient in the other Part of the Condition, the Intent of the Parties will not ſerve, as appears by the Book of (a) 39 *H* 6. 10. a. where the Condition of a Bond was, That if the Defendant did not pay ſo much Money the Bond ſhould be void; it was adjudged on the Words that the Bond was ſaved by the Non payment of the Money, altho' the Intention of the Parties was, That the Defendant ſhould be bound to pay the Money, and not that he ſhould be compelled not to pay the Money, as was expreſs'd by the Words. And ſo 'twas concluded, That the Arbitrators having made no Award, the Condition was performed, and he hath ſaved the Bond, altho' the Award of the Umpire was not performed, becauſe the Performance thereof was no Part of the Condition, but inſenſible and abſurd. But it was reſolved and adjudged by the Court, That the Condition was good enough *in ea parte*, tho' it was not ſo properly expreſſed, and that the Defendant had forfeited his Bond by not performing the Award of the Umpire. And they ſaid, that ſome Words whereby the Intent of the Parties may appear, are ſufficient to make a Condition of a Bond, becauſe if the Words, tho' they be improper, ſhall be conſtrued to be void and not a Condition, then in many Caſes, and perhaps in this very Caſe, the Bond will be ſingle and of Force againſt the Defendant, tho' he hath performed the Condition thereof according to the Intent of the Parties: And the Condition being for the Defendant's Benefit, ſhall be conſtrued favourably for his Advantage. And tho' in this Caſe ſuch Conſtruction is to the Defendant's Prejudice, yet the Law is the ſame in all Caſes, and can't be altered in this particular Caſe. And Judgment was given for the Plaintiff. *Saunders* of Counſel for the Defendant.

(a) 1 Sid. 105. pl. 14. Ray. 68. S.C. & S.P. 1 Lev. 77. S.C. S.P. & 2 Mod. 285. 39 H. 6. *Where the Caſe is deni.d to be Law.*

[67]

Turbill's Caſe.

Paſche 19 *Car.* II. *Regis.*

1 Sid. 302. 2 Keb. 346.

Turbill an Attorney of the King's Bench, contracted with one *Nevinſon* for the Purchaſe of certain Land, and by Articles of Agreement covenanted with *Nevinſon* to pay him 200*l.* when the ſaid *Nevinſon* ſhould make a good Conveyance to the ſaid *Turbill* of the ſaid Lands, diſcharged of all Incumbrances; *Nevinſon* afterwards made a Conveyance to the ſaid *Turbill*, but there were Incumbrances on the Eſtate which were not diſcharged. But one *Norton* a Scrivener, and other the Creditors of *Nevinſon* hearing of this Conveyance to *Turbill* levied ſeveral Plaints in the Court of one of the Sheriffs of *London* in the Counter againſt the ſaid *Nevinſon* for their ſeveral Debts; and on *nichil* returned againſt him, according to the Cuſtom there of Foreign Attachments, the Money which *Turbill* had ſo covenanted to pay, was attached in his Hands as a Debt owing by him to the ſaid *Nevinſon*; whereupon *Turbill* ſued out a Writ of Privilege as a Clerk of the Court of King's Bench, directed to the Mayor, Aldermen and Sheriffs of *London*, reciting, That the chief Clerk of the Court and their Clerks, from the Time whereof, *&c.* have been impleaded *in Curia noſtra coram nobis & non alibi nec in examen trahi debeant coram aliquibus Juſticiariis ſive Judicibus ſecular. in aliquibus placitis* (Felonies, Appeals and Freehold only excepted) notwithſtanding which the ſaid Creditors had drawn the ſaid *Turbill*, being one of the Clerks of Sir *Robert Henley*, Knt. chief Clerk aſſigned to enroll Pleas *in Curia noſtra coram nobis in placitum & examen coram vobis ſeu aliquo veſtrum* on Plaints levied againſt the ſaid *Nevinſon in Enervationem conſuetudinis præd.* and to the Damage of the ſaid *Turbill*, wherefore the ſaid Writ commanded them *ad omnem ulteriorem proſecutionem ſuperinde* againſt the ſaid *Turbill ſuperſed. pericalo incumbente dicentes partibus prædict. quod ad Curiam noſtram coram nobis accedant juſtitiam ibidem in ea parte conſecuturi ſi ſibi viderint expediri*; which Writ being delivered, *Phillips* of the *Inner-Temple* (being Judge of the Sheriff's Court) would not

allow it; but ordered all Proceedings to ſtay *quouſq;* the Matter ſhould be moved in the King's Bench. And now this Term it was moved on Behalf of the Creditors that the ſaid Writ of Privilege doth not lie, becauſe the Plaintiffs in the Sheriff's Court can have no Remedy againſt the ſaid *Turbill* in this Court, or any where [68] out of the Sheriff's Court, becauſe it was a cuſtomary Way of Proceeding, which the Common Law don't warrant, nor can any Action at Common Law be brought in ſuch Manner. And 'twas ſaid, That it would be a hard Caſe if the Privilege ſhould be allowed, for then the Creditors would loſe their Debts, and yet *Turbill* would not ſuſtain any Damage, for he only pays what he hath covenanted to pay, and would be diſcharged againſt the ſaid *Nevinſon*: And if *Turbill* ought not to pay the Money by the Articles, becauſe the Lands were not diſcharged of Incumbrances, he might defend himſelf in the Sheriff's Court as he ſhould be adviſed. And for *Turbill* it was anſwered, That the Privilege of this Court ought not to be broke for any ſuch cuſtomary Action: And it was ſaid, That the Privileges of the Courts at *Weſtminſter* have been in many Caſes allowed againſt the cuſtomary Actions in *London* as in 38 *H.* 6. 29. *b.* An Action on a *conceſſit ſolvere*, which is a cuſtomary Action in *London* was diſcharged by the Privilege of the Common Pleas, after a long and ſerious Debate: So 9 *E.* 4. 35. *b.* An Action on the Cuſtom of *London* againſt a Feme ſole Merchant, was diſcharged by Privilege, becauſe the Defendant and her Husband were ſued in the Common Pleas; and yet this was a cuſtomary Action which don't lie in the Common Pleas, nor any where out of *London*. **Cro.* 16. *Car.* 585. Alderman *Abdy* had his Privilege of Alderman of *London* allowed againſt a Cuſtom to elect Conſtables according to the Order of Houſes within a Leet. And for expreſs Authorities in the Caſe, *Edwards* and *Tetburie*'s Caſe was cited in *Mich.* 31 & 32 *El. Leon.* 1. *Rep.* 189. *Edwards* was indebted to one *A.* and delivered Goods to *Tedbury*, being a Carrier, to carry them; *A.* attached the Goods in the Hands of the ſaid *Tedbury* the Carrier, who being privileged in the Common Pleas by an Action was diſcharged of the Attachment. And *Lodge*'s Caſe 20 *El. Leon.* 2. 156. *Lodge* was indebted to *Booth*, who was indebted to *Diggs*, who attached his Debt in *Lodge*'s Hands, which is the very ſame with the Caſe in Queſtion, and there *Lodge* being an Attorney of the Common Pleas had his Privilege, and the foreign Attachment in that Caſe was diſſolv'd. And there *Dyer* ſaid, That the Privilege of the Common Pleas ought not to be impeached by a Cuſtom, which laſt Caſe agrees with the Caſe in Queſtion *in omnibus*. And it was further ſaid, That if the Privilege ſhall not be allowed, then the Privilege will ſignify nothing, for it will be at the Pleaſure of the Party to compel an Attorney to plead in *London* when he will; for ſuppoſe I pretend an Attorney owes me Money, I will cauſe my Friend to levy a Plaint againſt me in *London* for a Debt which I have deſignedly contracted with him, and then the Attorney will be drawn to plead out of the [69] Court, where his Attendance ought to be, into *London* by a Contrivance, and yet hath no Remedy. And as in the Caſe of an Attorney, ſo will it be in the Caſe of all other Officers of the Court, and the Court will be deprived of the Service and Attendance of all their Officers. But notwithſtanding the Court, for the Reaſons offered by the Creditors, and becauſe they thought the Caſe hard on them if the Privileges ſhould be allowed, would not allow it. But made a Rule that they ſhould proceed in *London*, notwithſtanding the ſaid Writ of Privilege. *Jones*, *Kelynge*, *Saunders & alii* of Counſel with the ſaid *Turbill*.

[68]

* 1 Jon. 462.

[69]

[73] *Peacock* againſt *Bell* and *Kendall*. [73]

ERror brought by *Peacock* againſt *Bell* and *Kendall* on a Judgment in the County Palatine of *Durham*, where *Bell* and *Kendall* being Plaintiffs, they declare, That the Defendant *Peacock* 11 *Novembris Anno Regni Regis nunc* 17 *apud Civitat' Dunelm' indebitat. fuiſſet* to the Plaintiffs in 39 *l. pro diverſis Merchandizis*

1 Sid. 330. 2 Keb. 182, 226.

Merchandizis & Mercimoniis per predictos Querentes eidem Defendenti ante tempus illud vendit & deliberat'; and being ſo indebted, he promiſed to pay, [74] On *non Aſſumpſit* pleaded, a Verdict and Judgment was given *pro Quer'* in the Action there, and now in a Writ of Error brought, and the common Error aſſigned, an Exception was taken to the Declaration, becauſe it was ſaid, That the Defendant in the Action *apud Civit' Dunelm'* was indebted to the Plaintiff in 39 *l pro diverſis Mercdandizis, &c. ante tempus illud vendit' & deliberat'*; But it is not ſaid *(ibidem) vendit' & deliberat'*; and ſo it don't appear to be within the Juriſdiction of the Court; For tho' 'tis ſaid that the Defendant was indebted *apud Civitatem Dunelm'*, yet it does not appear but that the Goods were ſold and delivered at another Place out of the Juriſdiction of the ſaid Court: And a Contract in a particular Place, makes a Man a Debtor in every Place in *England*: And for this Exception, many Judgments out of inferior Courts are daily revers'd; which was agreed on the other Side: But it was anſwered, That tho' 'twas a good Exception to a Declaration in an inferior Court for the Reaſons aforeſaid, yet it is no Exception in this Caſe; for the County-Palatine Court is an original Court, and reckoned among the Number of ſuperior Courts, as in the Statute *de tertio Jac. cap.* 8. Executions in the Courts of the Counties Palatine and Grand Seſſions in *Wales*, in certain Caſes there ſpecified, ſhall not be ſtay'd by Writ of Error without Security, any more than in the Courts at *Weſtminſter*, And 9 *H.* 7. 12. A Recovery of Lands in a County-Palatine, at *Weſtminſter*, is void; becauſe out of the Juriſdiction of the Courts at *Weſtminſter*. (a) And the Courts at *Weſtminſter* will take Notice of the Proceedings of the Courts of the Counties Palatine, as well as of the Courts of Grand Seſſions, as *Cro. Car.* 5. 179. *Griffith* againſt *Jenkins*, the Court here did judicially take Notice of the Proceſs of the Grand Seſſions; as *Cro.* 38. *El.* 503. this Court took Notice of the Cuſtom in *Wales* to give final Judgment on a *Quod ei deforceat*; and the Courts of the Counties Palatine don't certify their Juriſdiction on a Writ of Error, any more than the Court of Common Pleas, becauſe the Court here judicially takes Notice of their Juriſdiction: And all the Entries of Judgments are *Ideo conſideratum eſt* generally (without ſaying *per Cur.)* in the Counties Palatine as well as in the Common Pleas: And yet that is ill in an inferior Court, as it hath been oftentimes adjudged. And the Rule for Juriſdictions is, That nothing ſhall be intended to be out of the Juriſdiction of ſuperior Courts, but what ſo particularly appears. But *econtra* nothing ſhall be intended to be within the Juriſdiction of an inferior Court, hut what is expreſly alledged. * And altho' the Court of the County Palatine is inferior to this Court of King's Bench, yet that doth not prove that 'tis an inferior Court in the Senſe that it ought to certify every Thing preciſely; for the [75] Common Pleas is inferior to this Court, but yet it is an original and a ſuperior Court whereof the Law it ſelf takes Notice; and ſo is the Court of the County Palatine; and then the Omiſſion of the Word *ibidem* in the Declaration is no Error, *quia* it ſhall be intended that the Contract was made within the Juriſdiction, if it don't appear to the contrary, as in this Caſe: And *Wyndham* and *Moreton*, Juſtices, were of this Opinion, but *Kelynge*, Chief Juſtice, and *Twyſden* held the contrary, and that the Declaration was erroneous for this Cauſe: And at another Day it was moved again, and then *Twyſden* ſaid he had adviſed with the other Judges, and they were all of Opinion, That the Court of the County Palatine was an original ſuperior Court, and therefore the Declaration was good; but if it had been ſo in an inferior Court it had been ill; wherefore the Judgment was affirmed by *Twyſden*, *Wyndham* and *Moreton*, *Kelynge retinent' priorem opinionem ſuam*. *Saunders* of Counſel with the Defendant in the Writ of Error.

[74]

* Palm. 55.

(a) Cro. Car. 528. Cro. El. 544. Pl. 16. 2 Co. 16. b. Cro. Car. 53. Salk. 269. Pl. 17. 1 And. 191. 4 Co. 93. b. 1 Ro. R. 106. Godb. 436, 437. 1 Sid. 331. Cro. Cro. 445. Plow. 220. b. 1 Leon. 170.

* Palm. 55.

[75]

[76] D E [76]

Term. Sanct. Trin.

Anno Regni Regis Car. II. 19.

[81] Lawe *againſt* King. [81]

TReſpaſs for an Aſſault and Battery and Falſe Impriſonment. The Plaintiff declared, That the Defendant 1 *Aprilis Anno Regni Regis nunc* 18 *apud Burgum de Warw. vi & armis, &c.* made an Aſſault on the Plaintiff, and beat, wounded and impriſoned him for the Space of two Days, *& alia enormia, &c.* The Defendant as to the Aſſault, Battery, and Wounding pleaded *ſon Aſſault demeſne*; and as to all the Impriſonment except eleven Hours he pleaded *Non Culp.* and as to the Impriſonment for eleven Hours, he pleaded in Bar, That the Impriſonment was made 10 *Januarii Anno Regni Regis nunc* 16. *apud* the City of *Coventry in Com ejuſdem Civit'*. And that the Defendant the ſame Day and Year, for the Space of a Fortnight after, was one of the Sheriffs of the ſaid City of *Coventry*, and that the ſame Day the Defendant with ſeveral of his Officers and Servants *fuit in Executione Officii ſui* at the City of *Coventry* aforeſaid, *viz.* in watching and keeping the common Gaol of the ſame City, leſt any of the Priſoners there ſhould eſcape; and being ſo in the Execution of his Office, the Plaintiff at the eleventh Hour of the Night of the ſame Day, being an *unſeaſonable Time*, came there and ſtruck the Defendant *cum clauſo pugno, ac ipſum* the Defendant *ab Executione Officii ſui prædicti per Rixas & pugnationes in tantum impedivit* that he could not attend his Office, whereupon the Defendant to keep the Peace impriſoned the Plaintiff 'till the next Morning, and then he carried him before a Juſtice of Peace, who bound the Plaintiff over to appear at the next Aſſizes, which is the ſame Impriſonment for the Space of eleven Hours, whereof the Plaintiff complained: And traverſed *abſque hoc* that the Defendant was guilty out of the City of *Coventry* any Time before or after he was one of the Sheriffs. *Et hoc, &c. Unde, &c.* But the Defendant in all his Pleas ſaid nothing to the *vi & armis*, whereupon the Plaintiff demurred in Law to both the ſpecial Pleas. And it was now objected, that the not anſwering to the *vi & armis* had made both the Pleas ill: But to that it was anſwered, That the *vi & armis* is but Matter of Form, which is aided by the Statute of 27 *El. cap.* 5. of general Demurrers; for it appears in 7 *H.* 6. 13. *b.* and 1 *H.* 7. 19. That if the Defendant is acquitted of the Special Matter, the *vi & armis* ſhall not be inquired of; ſo if the Defendant is attainted of the Special Matter by Judgment on Demurrer, the *vi & armis* ſhall not be tried, altho' the [82] Defendant hath taken Iſſue thereon: But he ſhall be fined and a *Capiatur* awarded againſt him without more ado, as the Courſe is in all ſuch Caſes: And ſo was the Opinion of the whole Court; and without any Difficulty it was adjudged for the Defendant, *Quod Querens nil capiat per Billam. Saunders* of Counſel with the Defendant. *Vide Cro. Jac.* 559. *Rex verſus Hopper.* [82]

1 Lev. 216.
2 Keb. 237.

[84]

[84] Wright *againſt* Ramſcot.

1 Sid. 336.
1 Lev. 2 6.
2 Keb. 237.

TReſpaſs, the Plaintiff declar'd that the Defendant 1 *Aprilis Anno Regni Regis nunc* 17. *quendam Moloſſum ipſius Querentis apud Caſtleton in Com. Derb' verberavit percuſſit & cum quodam cultello confodit Anglice* did Stab, *Ita quod ratione inde moloſſus præd. interiit, Et alia enormia, &c.* The Defendant pleaded in Bar, That the Plaintiff the ſame Day and Year *apud Parochiam Capelle in le Frith* in the ſame County, ſuffered the ſaid Maſtiff to go on unmuſled in the Street, by Reaſon whereof the ſaid Maſtiff *violenter currebat in & ſuper quendam Canem cujuſdam Ellene Bagſhaw & Canem præd. adtunt & ibidem momordebat* (which Dog the ſaid *Ellen* did keep in her Houſe for the Preſervation thereof) wherefore the Defendant being Servant to the ſaid *Ellene adtunc & ibidem moloſſum præd. occidit ne dampnum ulterius faceret, Et hoc, &c. Unde, &c.* On which Plea the Plaintiff demurred in Law. And *Saunders* of Counſel for the Plaintiff argued, that the Plea was ill, becauſe the Law takes Notice of a Maſtiff as a valuable Thing, and there is an original Writ for killing a Maſtiff in the *Regiſter* 109. *a.* (b) and in *Cro.* 31 *El.* 125. *Ireland* againſt *Higgins*, it is ſaid, That the Law takes Notice of a Maſtiff, a Hound, a Spaniel, and a Tumbler; and a Man may juſtify in Battery for the Preſervation of his Dog, as appears in *Raſtall's Entries* 611. *b. Treſpaſs in Aſſault and Battery*, *pl.* 19. and in *Cro.* 2 *Jac.* 44. *Wadhurſt* againſt *Damme*, Treſpaſs was brought for killing a Maſtiff; and it is not there doubted but the Action well lay; but there the Defendant juſtified, for that the Maſtiff infeſted a Warren, aad could not be otherwiſe prevented from doing Miſchief there; but here the Defendant hath done an Injury to the Plaintiff, by making him loſe a valuable Thing without any Cauſe, for the Plaintiff is not compellable by the Law to muſle his Maſtiff ſolong as he doth no Damage; and it is natural for one Dog to bite or worry another, and he is not for that Reaſon to be killed, unleſs he cannot be otherwiſe prevented. And here the Defendant hath not ſaid, That he could not otherwiſe part or take off the Maſtiff from worrying the other Dog; and if he had ſaid ſo, that would have altered the Caſe: And he might have juſtified bearing the Maſtiff for the Preſervation of the other Dog, but not the killing him, unleſs it could not otherways be prevented. But in this Caſe he ſays no more, but that he killed the Maſtiff to prevent his killing the other Dog, whereas nothing appears to the contrary, but that he might have ſaved the other Dog without killing the Maſtiff: So he hath killed the [85] Maſtiff *Abſque aliqua neceſſitate ſive cauſa*, which is not juſtifiable; and he hath not in the leaſt excuſed that Injury; and ſo he concluded that the Plea was ill, and the whole Court was of that Opinion; and Judgment was given for the Plaintiff. *Note*, (c) there was another Exception to the Plea, *ſcilicet*, That the Plaintiff had laid the Treſpaſs *apud Caſtleton*; and the Defendant had juſtified at the Pariſh of *Chapel* in the *Frith*, and yet his Juſtification was not local, but tranſitory, in which Caſe he ought to have juſtified in the ſame Place where the Plaintiff had declared; but it was not moved. *Vide* for this *Cro. El.* 174, 184.

(b) Ow. 93, 94.
1 Ro. abr. 5.
Hob. 283.
Cro Jac. 462.
Pl. 10.
Cro Jac. 262.
Pl. 25.
1 Bulſt. 55.
2 Lev. 201.
3 Keb. 785.
Thomp. Ent. 33.
3 Lev. 336, 333.

[85]

(c) Lut. 14, 345, 618.
1 Sid. 224.
Pl. 37.

[86] DE [86]

Term. Sancti Mich.

Anno Regni Regis Car II. 19.

[97] Pitt *againſt* Knight. [97]

ERror on a Judgment in Debt in the Court of *Briſtol*, where the ſaid *Knight* and *Knight* were Plaintiffs againſt the ſaid *Pitt* Defendant, and declared in Debt on Bond for 600 *l.* *Pitt* the Defendant there pleaded, That the Plaintiffs had formerly recovered in the King's Bench on the ſame Bond: The Plaintiffs replied *Nul tiel Record, Et hoc, &c. Unde pet. Judicium & debitum ſuum prædict' ſibi adjudicari, &c.* The Defendant there rejoined *quod habetur tale Recordum recuperationis debiti præd. quale ipſe ſuperius allegavit prout per Recordum inde reſiden. in Banco Regis apparet Sed quia recordum de recuperatione præd. reſiden. in Banco Regis in Cur. hic nunc judicialiter haberi vel proferri non poteſt Idem* the Defendant *petit Judicium ſi Cur. nunc hic de & ſuper premiſſis ulterius procedere velit, &c.* And thereupon the Court of *Briſtol* gave Day to the Defendant there to bring in the Record, and on Failure of the Record Judgment was given there *Quod Querentes recuperent debitum & dampna, &c.* (altho' they prayed none in their Replication.) And the Errors which were inſiſted on at the Bar were two; 1. That the Plaintiffs in the inferior Court had prayed no Damages in their Replication. 2. That the Court had given Judgment on Failure of the [98] Record; whereas they ought to have ſurceaſed their Proceedings; or at leaſt the Plaintiffs ought to have demurred on the Rejoinder, and Judgment ſhould be given on the Demurrer; and theſe Errors were argued for three Terms. And to the firſt Error it was argued, That the Replication was ill for want of praying Damages, and then the Plaintiffs ought not to have Judgment. And the Caſe of *Peared* and *Chambers*, *Cro. El.* 256. was cited, where the *Plaintiff did neither aver his Replication, nor pray his Debt and Damages; and for both theſe Faults the Judgment was revers'd: But this Point was over-ruled, becauſe the not praying Damages is but Matter of Form; for the Plaintiffs here have averred their Replication, and prayed their Debt, and the Omiſſion of the Word *(dampna)* is aided by the Statute of general Demurrers. As to the ſecond Point it was argued, That the Court below ought to have ſurceaſed their Proceedings on the Foreign Plea of the Record *in Banco Regis*, and ought not to have proceeded or given any Judgment, becauſe it cannot be tried: And theſe Caſes were cited, Statute *Glouc'* 12. — 2 *Inſt.* 324. A Foreign Plea in real Actions, but not in perſonal Actions, is aided by that Statute. *Br. Titulo* Cauſe of removing a Plea, 41—3 *H.* 4. 11. *b.* & 18. Debt on Bond in *London*, the Defendant pleaded *per dureſſe* at *Windſor*, and on Demurrer the Judgment was *quod ſequatur ad Communem legem, Defendens eat inde ſine die.* 32 *H.* 6. 26. By an Iſſue joined in a Foreign Plea the Court is ouſted of Juriſdiction. And as to that it was argued on the other Side, That the Record in the King's Bench might be removed by *Certiorari* out of Chancery, and tranſferred by *Mittimus* to the Court of *Briſtol*; and ſo the

1 Sid. 329. 1 Lev. 222. 2 Keb. 205. 249, 278.

[98]

* *The Original is Defendant, and ſo miſprinted.*

the Iſſue of *Nul tiel Record* might be tried there, and ſo 'tis no Foreign Plea: And if it ſhould be otherwiſe conſtrued, then all Actions in inferior Courts ſhall be ouſted by a Fiction, for in Truth there was not any Record in this Court, as the Defendant before had pleaded. Whereunto the Plaintiff in Error anſwered, That no Record here in the ſuperior Court, ſhall be removed out of this Court and ſent to an inferior Court. *Cro Car.* 297, *Lutterel's* Caſe, it was doubted if a *Certiorari* to certify a Record out of this Court to the Common Pleas on *Nul tiel Record* pleaded there be allowable; but if it had been to an inferior Court without Doubt 'twas not, as it ſeems by the ſaid Book, *Cro. Car.* 34. This Court will not execute the Judgment of an inferior Court remov'd by *Certiorari*. And as to the Objection of ouſting the Juriſdiction of the inferior Court by a Fiction; 'twas anſwered, That the Court might have compelled the Defendant to ſwear the Truth of his Plea, or otherwiſe they might have entered a *Nil dicit* againſt him. And if [99] he ſwears it, then 'tis no greater a Miſchief than in the Caſes [99] above. But admitting the Record might have been removed to *Briſtol*, yet 'twas argued, That here the Judgment given on Failure of the Record was erroneous and without any Iſſue joined, for the Defendant in his Rejoinder ſaid, That there was ſuch a Record, but he could have it there, which is all one as if he had ſaid that he would not have it there, and then the Plaintiffs ought to have demurred, for there was no Iſſue joined by the Defendant; for if the Defendant would have joined Iſſue, he ought to have ſaid in his Rejoinder that there was ſuch Record (*Et hoc paratus eſt verificare per Recordum illud*) as all the Precedents are, as in *Raſtal's Entries*, *Appeals en Mort.* 5. *Conſpiracy en Bar.* 2, 3. *Debt en Gaoler.* 2. *Debt en Recovery.* 5. and all the Books. And for Want of this Averment, the Rejoinder was ill, and the Plaintiffs ought to have demurred; and upon that the Court ought to have given Judg-
(a) Salk. 289. Pl. 3. ment, and not on the Failure of the Record. (a) And now this Term the Court was of Opinion, That the Record in this Court might have been certified to *Briſtol* by *Certiorari* and *Mittimus*. But for the other Point *Kelynge* Chief Juſtice declared his Opinion that there was not any Iſſue joined, *quod Cur. non contradixit*. But when it was prayed, That the Judgment might be revers'd, the Court affirmed the Judgment againſt their own Opinions. *Quod Nota*. *Saunders* of Counſel with the Plaintiff in Error, and *Jones* with the Defendant.

[102] Hayman *againſt* Gerrard.

1 Sid. 340. 1 Lev. 226. DEBT on Bond, the Defendants prayed *Oyer* of the Condition, which is, That the Defendant render a full Accompt to the Plaintiff of all ſuch Sums of Money and Goods as were due and belonging to one *William Norrel* at the Time of his Death, *which ſhall any Way come* to the Hands of the Defendant, *and ſhall upon ſuch Accompt, within the Space of one Week, when required, make an equal Dividend of all ſuch Sums of Money and Gsods, and pay the Plaintiff his Proportion of the ſame*, then the Bond ſhall be void, *&c.* The Defendant pleaded, That no Goods or Sums of Money came to his Hands, *Et hoc, &c.* The Plaintiff replied, That a Silver Bowl which belonged to the ſaid *William Norrel* at the Time of his Death, came to the Defendant, *viz.* at ſuch a Day and Place. *Et hoc paratus eſt verificare, &c.* On which Replication the Defendant demurred in Law; and it was argued by *Saunders* of Counſel for the Defendant, That the Replication was ill for two Reaſons; (1.) Becauſe the Plaintiff in his Replication hath not ſhown any Breach, for the Condition is, That the Defendant ſhall render an Accompt and pay the Moiety of ſuch Goods as ſhall come to his Hands; and the Defendant hath pleaded, That no Goods came to his Hands; now 'tis not ſufficient for the Plaintiff to ſay, That Goods came to the Hands of the Defendant: but he ought to ſhew farther that the Defendant hath not made a Dividend or paid the Proportion;
(a) Cro. Jac. 221. Yelv. 153. for otherwiſe the Plaintiff hath ſhewn no Cauſe of Action. (b) And he put the Caſe of a Bond to perform an Award, there if the Plaintiff pleads

no Award made, 'tis not ſufficient for the Plaintiff in his Replication to ſhew the Award, but he ought likewiſe to ſhew a Breach of it to maintain his Action, or otherwiſe the Replication is ill. (2.) He argued, That admitting the Plaintiff in this Caſe is not obliged to ſhew a Breach in his Replication, yet he ought to conclude to the Country, and not with a *Hec paratus eſt verificare*; for the Defendant hath pleaded in the Negative that no Goods came to his Hands; and the Plaintiff hath replied, That a Silver Bowl came to his Hands, which is a direct Affirmative; and ſo an Iſſue ought to have been tender'd by the Plaintiff in his Replication, as in 1 *Inſt.* 126. *a.* where in Debt for Rent on a Leaſe-parol, the Defendant pleaded *Nil habuit in Tenementis*; the Plaintiff replies, That he was ſeiſed in Fee; he ought to conclude to the Country: So in *Yelverton* 137. Debt againſt an Executor, who pleaded, That he had nothing in his Hands except 10 *l.* which he retained for his own Debt: The Plaintiff replied, That he was Executor *de ſon* [103] *Tort*, and that he had Goods above the 10 *l.* there he ought to conclude to the Country; and for want thereof the Replication was ill: And ſo he concluded, the Replication in this Caſe was inſufficient either for the one or the other of the ſaid Reaſons. *Jones pro Quer.* argued, That the Replication was good enough; and as to the firſt Point he ſaid, That the Plaintiff is bound to ſhew a Breach in no Caſe, except in that of an Award, and there he ſaid the Reaſon was becauſe an Award may be good in one Part and ill in another, and therefore the Plaintiff ought to ſhew a Breach of it; ſo that the Court may judge whether the Plaintiff hath rightly conceiv'd his Action or not; for perhaps he hath brought his Action for a Breach of that Part of the Award which is void in it ſelf, and ſo hath no Cauſe of Action. And he put the Caſe of *Griffin* and *Spencer*, *Cro.* 26 *El.* 320. and the Caſe of *Baily* and *Taylor*, *Cro. El.* 899. and *Yelv.* 24. and the Caſe of *Jeffrey* and *Guy*, *Yelv.* 78. That when a Special Point is in Iſſue, the Plaintiff need not ſhew more: And as to the other Point he did not ſay much, but that the Defendant ought to have rejoined and tender'd the Iſſue in his Rejoinder. And the Court *ſeriatim* delivered their Opinions, that the Replication was ill, becauſe the Plaintiff had not therein ſhewn any Breach; and as to the Caſes cited by *Jones*, they ſaid, That all of them except the laſt was after Verdict, and ſo aided; and as to the laſt Caſe they ſaid, That the Plaintiff in that Caſe could not reply otherwiſe, becauſe of the Defendant's Special Plea. And *Twyſden* cited a Caſe where a Man was bound to pay the Obligee 10 *l.* on the Day of his Marriage, and in an Action on the Bond the Defendant pleaded, That the Obligee was not married; and the Plaintiff replied, That he was married on ſuch a Day, and on Iſſue joined, and Verdict given thereon, it was adjudg'd to be aided after Verdict: But if the Defendant had demurred as here, it had been ill, as he ſaid the Opinion of the Court then was; and thereupon (the Opinions of the Judges being *ſeriatim* given, and the Court ready to give Judgment for the Defendant) at the Inſtance of the Plaintiff's Counſel, the Matter was by Conſent referred to *Jones* and *Saunders* to compromiſe, who determin'd it by their Award, and ſo no Judgment was entered. *Nota*, The Court ſaid that the Replication in this Caſe was well concluded and as it ought, *Quod mirum videtur*: for I think the Replication was ill for that, but good enough for the other Point, for the Books cited by *Jones* are directly in Point.

(b) Yelv. 38. Cro.El. 755. Cro.Car. 164. 1 Mod. 72. 2 Saund. 189, 190. 1 Mod. 289.

[103]

Yelv. 152. Cro. Jac. 220.

[111] *The Dean and Chapter of* Briſtol *againſt* Guyſe. [111]

COvenant. The Plaintiffs declare in this Manner *ſſ. Dec' & Capit' Eccleſiæ Cathedralis Sanctæ & individuæ Trinitatis Briſtoll queruntur de Chriſtophero Guyſe Bar' in Cuſtodia Mar'*, *&c. de placito Conventionis fract'*. And then ſhew, that the ſaid Dean and Chapter 9 *Julii* 2 *Eliz.* did by Indenture demiſe to one *George Harvey* the Rectory and Parſonage of *Berkley cum pertinen. in Com. Glouc. Habend.* for ſixty Years after the Determination of another Eſtate then *in Eſſe*: And that *Harvey* covenanted for himſelf and his Aſſignees to repair and keep in Repair all the Premiſſes demiſed during the Term to him grant-

ed: And they further declare, that afterwards, *ſcil'*, in the Year 1631. the firſt Term ended, and the ſaid *Harvey* enter'd on the Premiſſes, and his Term then commenced, and he was thereof poſſeſſed; which Eſtate of the ſaid *Harvey*, *quidam Willielmus Guyſe nuper habuit per aſſignationem & fuit inde poſſeſſionat'*; and the ſaid *William Guyſe* being ſo poſſeſſed, made his Will, and conſtituted the Defendant Executor thereof, and afterwards died; after whoſe Death the Defendant enter'd and was poſſeſſed as Executor. And then the Plaintiffs aſſign for Breach, That the Chancel of the Pariſh-Church of *Berkley* in the Life of the ſaid *William Guyſe*, and after his Death, was in Decay, and that a great Barn, Parcel of the demiſed Premiſſes, was likewiſe in Decay; and that the ſaid *William Guyſe* the Teſtator in his Life, nor the ſaid Defendant the Executor, after the Death of the ſaid Teſtator, had repaired the Chancel and Barn ſo in Decay; on which they brought their Action. The Defendant *quoad* the Breach in not repairing the Chancel, pleaded, That the ſaid Dean and Chapter did not demiſe the ſame to *Harvey*, and Iſſue was joined thereon: And as to the other Breach in not repairing the Barn, he demurs on the Declaration. And on Trial of the Iſſue, the Jury find a Verdict for the Plaintiffs and 200 *l.* Damages on the Iſſue, and 100 *l.* Damages on the Demurrer on the Breach in not repairing the Barn, if Judgment ſhould be given thereon for the Plaintiffs. And now this Term on the Demurrer, the Defendant's Counſel objected, That the Plaintiffs had miſtaken their Action; for they have in this Caſe ſued the Defendant in his own Right, when it appears by their own ſhewing, That they ought to have ſued him as Executor only, and not otherwiſe; for the Defendant is [112] not [112] chargeable here for a Breach of Covenant, unleſs he hath Aſſets of the Teſtator's in his Hands. (a) And the Books of *Hob. Rep.* 188, 283. *Cro. Jac.* 647, 671. were cited, whereby it appears that Judgment ought to be *de bonis teſtatoris* in an Action of Covenant, tho' the Breach is for the proper Default of the Executors. And ſo it ought to have been in this Caſe; (b) but here the Defendant is ſued in his own Right, and not named Executor as he ought, 30 *H.* 6. 5. And this Exception went as well to the Verdict as to the Demurrer in this Caſe. And ſo was the Opinion of the Court. *Baldwyn* of Counſel for the Plaintiffs ſaid, That if it was ſo on the Roll, he would pray Leave to diſcontinue; and the Roll was read, and it was ſo, wherefore he prayed Time to adviſe, and afterwards the Matter was compromis'd, and ſo no Judgment was entered. *Saunders* for the Defendant. But *Nota*, I apprehend that the Declaration being by Bill, was good enough; for on the whole Matter, the Plaintiffs have declared againſt the Defendant as Executor, tho' in the Beginning he is not ſo named, which is but Form. And the Plaintiffs might very well have their Judgment for the Damages *de bonis Teſtatoris* on this Declaration, but it was not moved. (c) There was alſo another Exception to the Declaration, That a *Que Eſtate* can't be pleaded of a Term. *Vide* for this *Cro.* 25 *El.* 22.

(a) Palm. 314. 1 Roll 932. Dyer 324. b. Salk. 317. Hutt 35.

(b) *It is in the Plaintiff's Election to ſue the Defendant as Executor or as Aſſignee,* Salk. 317.

(c) Antea 106.

Jemott *againſt* Cowley.

Mich. 19 *Car.* II. *Regis.*

1 Sid. 223, 344, 262. Raym. 125, 158. 1 Lev. 170. 1 Keb. 784, 515. 2 Keb. 20, 184, 270, 205. Cro. Jac. 55, 99, 511.

(18) *Fectione firmæ:* The Caſe was thus, A Man ſeiſed in Fee of Lands granted a Rent-Charge in Fee out of them; and further granted, That if the Rent ſhould be Arrear, then the Granteee, his Heirs and Aſſigns ſhould enter into the Lands and hold them till they ſhould be ſatisfied the Arrear of the Rent; *& ſic toties quoties* the Rent ſhould be Arrear. And afterwards the Rent was Arrear, and the Grantee enter'd and made the Leaſe to the Plaintiff who brought the Ejectment. And on a Special Verdict it was adjudged this Term by the whole Court *ſeriatim*, that ſuch Grant was good, and that the Grantee by ſuch Entry had ſuch an Eſtate, that he might make a Leaſe thereof to the Plaintiff, whereby he might maintain

his Ejectment. And ſo the Plaintiff had Judgment, which was afterward affirmed *in Camera Scaccarii. Nota*, It was a *Buckinghamſhire* Cauſe, and concerned Sir *Ralph Bovey* who was the Purchaſer of the Rent.

[116] Cutler *and others againſt* Southern *and others.* [116]

DEBT on Bond *dat.* 18 *Marcii Anno* 16 *Regni Regis nunc*: The Defendants pray *Oyer* of the Condition, which recites, That whereas the Plaintiffs at the Requeſt of the Defendants were bound to *Thomas Cooke* for the Payment of 103 *l.* 10 *s.* on the firſt Day of *May* next after the Date of the Bond. *If therefore the Defendants ſhall ſave, keep harmleſs and indempnified the Plaintiffs from all Troubles, Suits, Inconveniencies, Damages and Moleſtations from or by the ſaid* Cook, *or any other by his Means or Procurement, then, &c.* Whereupon the Defendants plead affirmatively, That they have *ſaved harmleſs, &c.* The Plaintiffs reply *quod ante tempus confectionis* of the Bond ſhewn in Court, *ſcilicet primo Octobr. Anno* 16 *ſupradicto*, the Plaintiffs at the Requeſt of the Defendants by their Bond became bound to the ſaid *Cook* in 200 *l.* on Condition for the Payment of 103 *l. ad quendam diem in eadem Conditione ſpecificat' tunc ventur' & jam præterit'. Ac pro eo quod prædictæ Centum & tres libræ non ſolutæ fuerunt præfato Thomæ Cook* at the Day in the Condition mentioned, the ſaid *Cook* afterwards, *viz.* 12 *Febr. Anno* 18 *apud London*, [117] *&c. proſecutus fuit* the ſaid Plaintiffs *ad legem pro recuperatione* of the ſaid Penal Sum of 200 *l.* and endeavoured to arreſt them, whereby the Plaintiffs could not go about their Buſineſs for fear of being arreſted: And ſo the Plaintiffs ſaid, That the Defendants had not ſaved them *harmleſs, &c.* The Defendants rejoined that they had not any Notice of the ſaid Damnification, and if they had, they would have ſaved the Plaintiffs *harmleſs, &c.* On which Rejoinder the Plaintiffs demur in Law. And it was argued for the Plaintiffs, That the Rejoinder was ill for two Reaſons; (a) 1, Becauſe the Defendants ought of themſelves to take Notice of the Act of a Stranger, as *Cook* in this Caſe is; and the Plaintiffs need not give them Notice of Dampnification occaſioned by *Cook*. (b) 2. Becauſe the Rejoinder is a Departure from the Plea in Bar, for in the Bar the Defendants plead that they have *ſav'd harmleſs* the Plaintiffs, and now in the Rejoinder they confeſs, That they have not ſaved them harmleſs, but that they had no Notice of the Dampnification, which is a plain Departure, and ſo was the Opinion of the Court. Then it was argued for the Defendants, That the Plaintiffs Replication was ill: And an Exception was taken to the Form of it, *viz.* That the Plaintiffs thereby plead *pro eo quod prædictæ Centum & tres libræ non ſolutæ fuerunt*, and don't poſitively aver that the Money was not paid; and that the Pleading by an *(eo quod)* was ill, the Caſe of *Palms* againſt *Epiſcopum Peterborough, Cro. El.* 241. was put, where the Biſhop in a *Quare Impedit* pleaded, *pro eo quod* the Plaintiff's Clerk did not ſhew his *Lettres Miſſive* and Orders, he refuſ'd to admit him, and 'twas adjudged ill; So 33 *El.* 441. *Gooday* againſt *Michael*; the Defendant pleaded in Treſpaſs *Quia* the Plaintiff *obſtruxit viam cum Januis prædictis* he broke them: And the Pleading by a (*Quia*) was adjudged ill; and in *Dyer* 257. *b. eo quod* is adjudged ill Pleading. Another Exception was taken to the Form of the Replication, becauſe the Plaintiffs reply, That the ſaid *Cook proſecut. fuit ad legem*, and don't ſhew in what Court nor in what Manner he ſued, for *ſi proſecut. fuit ad legem* is iſſuable, being the Breach aſſigned by the Plaintiffs to take Advantage of the Forfeiture of the Bond. Then as to the Matter in Law, it was argued for the Defendants, That the Plaintiffs have not in this Caſe aſſigned any Breach, for the Condition is, That whereas the Plaintiffs *ſtand bound* to *Cook* for the Payment of 103 *l.* 10 *s.* on the firſt Day of *May*, and here the Plaintiffs have ſhewn, That they were bound to *Cook* in 200 *l.* Penalty for Payment of 103 *l. ad certum diem jam preterit'*; and this was by a Bond dated after the Bond on which the Plaintiffs have brought their Action; for the Bond on which [118] the Plaintiffs declare is made [118]

(a) Cro. Jac. 1350, 138, 493, 684. Poph 165. Lit. Rep. 14.
(b) 1 Sid. 10. Pl. 6. 77. pl. 10. 180. pl. 16. 444. pl. 1. Lut. 419, 421, 424, 428, 383, 385.

8 *Marcii*

8. *Marcii Anno* 16 *Regni Regis nunc*, and the Condition recites, That they *ſtand bound*, and ſo it ſhall be intended that the Bond to *Cook* was then made; and the Bond to *Cook* mentioned in the Replication, tho' it is pleaded to be made before, yet 'tis ſaid to be on the firſt Day of *October Anno* 16, which is half a Year after; ſo the Bond mentioned in the Replication differs from the Bond mentioned in the Declaration in three Particulars; 1. in the Day of making it, for one is ſuppoſed to be made at the Time of the Bond, on which the Plaintiffs have brought their Action, and the other half a Year after. 2. In the Sum to be paid, for one is for 103 *l.* 10 s. and the other for 103 *l. tanoum.* 3. In the Day of Payment, for one is on the firſt Day of *May*, and the other *ad quendam diem jam præteritum*, which cannot be intended the ſame Day: And 'tis not averred that the Bond mentioned in the Replication was entered into for the proper Debt of the Defendant; and then tho' the Condition is general to ſave *harmleſs* againſt the ſaid *Cook* of all Actions, *&c.* yet it ought to have a reaſonable Conſtruction, for it will be unreaſonable to intend, that the Defendants were to ſave the Plaintiffs *harmleſs* from all Bonds which they ſhould afterwards voluntarily enter into to the ſaid *Cook* for their own Debt; for by that Means the Plaintiffs will take Advantage of their own Wrong, which would be unreaſonable and abſurd; But it ought to have this Conſtruction, That the Defendants ſhould ſave the Plaintiffs *harmleſs* from all Actions, *&c.* for any Cauſe before the making of the Bond, on which the Plaintiffs have brought their Action, for that is reaſonable, and according to the Intent of the Parties: And ſo 'twas concluded, that the Replication was ill, and that the Plaintiffs had ſhewn no Cauſe of Action; and then tho' the Rejoinder or Bar be ill, yet the Plaintiffs can't have Judgment. *Levinz* of Counſel with the Plaintiffs inſiſted on the Generality of the Words of the Condition, and that by the Condition the Defendants ought to ſave the Plaintiffs *harmleſs* from all Actions whatſoever, altho' they were cauſed by the Plaintiffs themſelves after the making the Bond, for it was the Defendant's Folly to be ſo bound. And he argued likewiſe that the Bond entered into to *Cook*, mentioned in the Replication, was entered into before the Bond brought into Court, and ſo clearly within the Condition; for it is preciſely averred that it was entered into before it, and then *ſcilicet* being contrary in mentioning a Time after, is void; and he put the ſeveral Caſes where a *ſcilicet* ſhall be void, if it is contrary or repugnant to the Matter preceding; and if the *ſcilicet* [119] be void, as (he ſaid) it was, [119] then the Want of a Day, is but Form, of which the Defendants can take no Advantage on a general Demurrer, and prayed Judgment for the Plaintiffs, *Hale* Chief Baron *& tota Curia* took no Notice of the Exceptions to the Pleadings, but on the Matter in Law they were of Opinion againſt the Plaintiffs, and adviſed them to diſcontinue; but they would not; and afterwards they gave Judgment for the Plaintiffs as *Levinz* informed me. *Saunders* of Counſel with the Defendants

[120] D E [120]

Term. Sancti Hill.

Annis Regni Regis Car. II. 19 & 20.

[131] Lake *againſt* King. [131]

ACTION on the Caſe for Printing and Publiſhing a ſcandalous Libel of the Plaintiff *Lake* by the Defendant *King*. The Plaintiff declared, That for ſix Years laſt paſt he was a Doctor of the Law, and Vicar General to the Biſhop of *Lincoln*, through the whole Dioceſs, in which Office he had behaved himſelf juſtly and incorruptly, without any Extortion, Corruption or Oppreſſion, yet the Defendant *primo die Decembris Anno* 18 *Regni Regis nunc Imprimi cauſavit & diverſis ſubditis dicti Dom' Reg' nunc deliber' publicavit & diſperſit* a certain falſe, ſcandalons and malicious Libel of the Plaintiff in the Execution of his Office *in hac Forma ſſ. To the Honourable the Committee of Parliament for Grievances, The Humble Petition of* Edward King *of* Grays-Inn *in the County of* Middleſex *Eſq; Sheweth, &c.* and in Fact the Petition charged the Plaintiff with *diverſe horrible and grand Abuſes*, as Oppreſſion, Vexation, and other Miſdemeanors in his Office *ubi revera* (as the Plaintiff averred) the whole Matter contained in the ſaid Libel, was falſe and malicious [132] to the Plaintiff's Damage, *&c.* The Defendant pleaded in Bar, That the Matter contained in the Petition was true, and ſhews how in ſome Particulars, wherefore the Defendant ſays, That on the laſt Day of *November Anno* 17 *ſupradicto* the ſaid Petition *in narratione prædict. ſpecificat. ſcribi & ingroſſari fecit ac eandem Petitionem ſic ut prefertur continen. materiam prædictam Conventui Anglice* to the Committee *adtunc & ibidem conſtitut. & appunctuat. per Communes adtunc & ibidem in Parliamento aſſemblat. ad audiend. & examinand. gravamina hujus Regni Angl' exhibuit & deliberavit Qui quidem Conventus adtunc & ibidem pltn. poteſtat. & authoritat. habuit ad hujuſmodi gravamina audiend. & examinand. per quem quidem Conventum idem Edwardus Lake poſteat ſcilicet eiſdem die & Anno apud Weſtm' præd. Summonit. fuit ad comparend.* and anſwer the Matters contained in the ſaid Petition *eidem Conventui, Et idem* (the Defendant) *ulterius dicit quod ipſe pro meliore manifeſtatione gravaminum in Petitione præd. content. poſtea ſcilicet prædicto primo die Decembris Anno* 18 *ſupradicto apud Weſtm' præd. eand. Petitionem imprimi cauſavit & diverſis Domini Regis nunc Ligeis exiſten. Membris ejuſdem Conventus adtunc & ibidem deliberavit ſecundum morem per alios in ea parte uſitat. & per membra ejuſdem Conventus approbat'. Que eſt eadem Impreſſio publicatio & diſperſio ſcripti unde idem* (the Plaintiff) *ſuperius ſe modo queritur, Et hoc, &c. Unde, &c.* To which Plea the Plaintiff demurred in Law, and this Caſe was ſeveral Times debated: * And it was agreed, That the exhibiting the Petition to the Committee of Parliament was lawful, and that no Action lay for it, tho' the Matter therein contained was falſe and

1 Sid. 414. Pl. 15. 1 Mod. 58. 1 Lev. 240. 2 Keb. 361, 462, 496. 459, 664, 801, 832.

[132]

* 1 Ro. abr. 112. 8. 4 Co. 14. b. Keilw. 29. b. Cro. El. 830.

Pl. 21, 247. p. 7. Dyer 285. a. p. 37. Mo. 705. p. 986. 2 Brownl 100 Hawk P. C. chap 73. ſect. 8.

ſcandalous,

ſcandalous, becauſe it is in a ſummary Courſe of Juſtice, and before thoſe who have Power to examine whether it be true or falſe. But the Queſtion was, Whether the Printing or Publiſhing it in the Manner as the Defendant had alledged in his Plea was juſtifiable or not? And it was argued, That if it was not juſtifiable; for then under a Pretence of Proceeding in a Courſe of Juſtice, a Libel may be printed, publiſhed and diſperſed of any Man throughout the Kingdom, and yet he ſhall have no Remedy: And therefore 'twas ſaid, That altho' the exhibiting of the ſaid Petition was lawful, yet the Printing was a Publication thereof to the whole World, which it is not lawful to do in any Caſe: And *Kelynge*, Chief Juſtice, in his Life-time ſeemed to be clearly of this Opinion: But *Twyſden* Juſtice *contra*, becauſe it is no more than if the Defendant had employed ſeveral Clerks to write as many Copies as are now printed. And for the Defendant it was argued, That the Charge in the Declaration conſiſted of two Parts, *viz.* (1) *Quod imprimi cauſavit, Et* (2) *diverſis* [133] *ſubditis Domini Regis deliberavit publicavit & diſperſit.* Then to conſider the Printing only, that of it ſelf is not a Publication, but only a ſtrong Evidence thereof, as it is ſaid in tranſcribing a Libel in *Lamb*'s Caſe *Co.* 9. 59. And the Plaintiff himſelf hath not relied on the Printing only to be a Publication, but hath further alledged, That the Defendant *diverſis ſubditis deliberavit publicavit & diſperſit*; ſo that the Court will not intend the Printing to be a Publication of it ſelf, when the Plaintiff hath alledged a farther Publication; ſo that the whole Streſs of the Caſe lies on the Publication, which the Defendant hath alledged to be to the Members of the Committee of Parliament, and hath averred that it is the ſame Publication whereof the Plaintiff hath complained; and therefore if the Publication in this Caſe is lawful, then the Printing in Order thereunto is likewiſe juſtifiable. And whereas it was objected, That by the Printing it ought to be intended that the Petition, which the Plaintiff terms a Libel, was delivered and diſperſed to others who were not Members of the ſaid Committee of Parliament (as in Truth it was) 'twas anſwered for the Defendant, That if it was really ſo, the Plaintiff ought to have replied that Matter, but now by his Demurrer he hath confeſſed, That the Publication whereof he hath complained, was only by the Delivery to the Members of the Committee; for ſo the Defendant hath alledged by his Plea, which the Plaintiff hath confeſſed by his Demurrer: And the Defendant chiefly inſiſted on the Order and Courſe of the Proceedings in Parliament, which allows the Printing and delivering Petitions and Caſes depending in Parliament, or before any Committee thereof. And as *Coleman* a Member of Parliament ſaid at Bar, That when it was queſtioned in the Houſe of Commons, whether it ſhould be allowed to print and deliver Copies of Petitions and Caſes to the Members, it was voted in the Affirmative, That it ſhould be allowed. And of the Order of Proceedings in Parliament and of their Committee, this Court will take judicial Notice. And now this Term (after this Caſe had depended twelve Terms) Judgment was given for the Defendant by *Hale*, Chief Juſtice, *Twyſden* and *Rainsford* on this Point, *viz.* (a) That it was the Order and Courſe of Proceedings in Parliament to print and deliver Copies, *&c.* of which they ought to take judicial Notice. Sir *William Jones* Counſel for the Plaintiff and *Saunders* for the Defendant.

(133)

(a) 2 Co. 6. b. Cro. El. 502, p. 24, 344. p. 16. Cro. Car. 179, 513, 528. Antea 73.

[135]

[135] *The King againſt* Dickenſon.

Dickenſon was preſented at the Court-Leet of the Queen-Dowager, for that he had *Vi & armis* encroached on the Queen's Cloſe *apud Seacroft infra juriſdictionem Cur', &c*, and had incloſed a Rood thereof, and had unjuſtly and unlawfuly erected a Cottage thereon, *ad commune nocumentum* of the Queen *& omnium inhabitantium ville de Seacroft ac contra pacem, &c. Ideo in miſericordia, Et amerciament' inde afferatur ad* 39 *s.* And this Preſentment being removed into the King's Bench by *Certiorari*, it was moved to be quaſhed, becauſe it is not founded on the Statute of 31 *El. cap.* 7. of Cottages, for it

2 Keb. 606, 613.

is not ſaid that the Cottage was erected for Habitation, as the Statute directs, neither does it conclude *contra formam Statuti* as it ought, if it had been founded on the Statute; and moreover the Statute appoints a certain Penalty of 10 *l.* and the Statute is not in this Caſe therein purſued: Then at Common Law the Preſentment is not good, becauſe the Incroachment on the Lord of a Manor incloſing Waſte and erecting a Cottage therein, is no Offence preſentable in a Leet (a) for which the Offender ought to be amerced; for it is not a publick Nuſance, but a particular Damage to the Lord; (b) for altho' it may be preſented at the Court-Leet by the Information of the Lord, yet the Court can't amerce the Offender for it, for the Court-Leet can amerce for nothing but publick Nuſances, and not for a particular Treſpaſs to the Lord, or any other, for which they may have an Action to [136] recover Damages. And ſo are the Books of 48 *E.* 3. 8. *a.*— 12 *H.* 4. 8. *b.* expreſly, and ſo was the Opinion of the whole Court, and the Preſentment was quaſh'd *ex motione Magiſtri Saunders.*

(a) Ray. 160. 2 Keb. 139. 3 Keb. 644. 1 Leon. 242.
(b) Fitz Av. 57. Fitz. Barre 187. Br. Cuſtom 16. Br. Ameriament 19. Br. Leets 2. Br. Diſtreſs 18.

[141] Croucher *againſt* Collins.

[141]

PRohibition. The Plaintiff declares, That *a tempore cujus, &c.* there had been a Rectory impropriate and a Vicar within the Pariſh of *Corhampton* in the County of *Southampton*; and that *a tempore cujus, &c.* there had been a great Quantity of arable Land amounting to 400 Acres and more, within the ſame Pariſh; and that Husbandry had been much uſed there, and the greater Part of the Land there had been yearly ſown with Corn; and that the Corn growing there could not be preſerved without fencing the Land where it grew, and that the Tithes of the Corn ſo fenced had been always paid to the Impropriator of the Rectory of the ſame Pariſh. And the Plaintiff further ſhews, That within the Pariſh there is a Cuſtom for Underwood, that if any Perſon cut his Underwoods, and the ſame be imployed for fencing the Corn, the Tithes whereof are paid to the Rector, and not ſold or otherwiſe diſpoſed, whereby the Tithes are preſerved: Then the Underwoods ſo imployed have been diſcharged of the Payment of Tithes to the ſaid Rector. And the Plaintiff likewiſe ſays, That he cut Wood within the ſame Pariſh *Quodque totum lignum illud abſque aliqua venditione ſeu aliquo alio profiuo inde facto in & circa erectionem & reparationem ſepium includend' Centum acr. terre arabilis* ſown with [142] Corn *applicat' & impenſ. fuit pro Salvatione bladorum ibidem creſcen. & non aliter diſpoſit fuit.* Yet the ſaid Defendant being Impropriator of the Rectory of *Corhampton* aforeſaid, hath ſued the Plaintiff in the Spiritual Court for the Tithes of the Wood ſo by the Plaintiff cut and imployed *in & circa* the Fencing of the Corn, whereof the Defendant had the Tithes, and endeavours to compell the Plaintiff to pay the treble Value of the Tithes of the ſaid Wood ſo imployed, *Ac licet* the Plaintiff had delivered the Defendant a Writ of Prohibition to ſurceaſe the Suit in the Spiritual Court, yet he proceeded afterwards notwithſtanding the ſaid Writ, in Contempt of the King, and to the Plaintiff's Damage, *&c.* The Defendant as to the Contempt in ſuing in the Spiritual Court, after the Writ of Prohibition delivered him, pleads *Non culp'.* But *pro Conſultatione habenda* he demurs in Law on the Declaration. And it was argued by *Jones* for the Defendant, That the Cuſtom was void and unreaſonable, becauſe it is not ſaid that the Corn which is inclos'd by the Wood, cut by the Plaintiff, was his own Corn; and it will be unreaſonable that the Rector ſhall not have Tithe thereof if it was imployed in enclоſing other than his own Corn; for then one who hath 300 or more Acres of Wood, may cut it, and give the whole to what Perſon ſoever he pleaſeth for incloſing their Corn; and ſo the Rector will be defrauded of all the Tithe of the ſaid Wood, which will be a great Prejudice to him, and therefore he concluded that this Preſcription was void and unreaſonable. And for the Plaintiff 'twas argued that this Preſcription was good enough, for in *Eaſt* and *Harding*'s Caſe. *Cro. El.* 499. It is ſaid, That if a Man cuts Wood

2 Keb. 319.

Cro. Car. 113.

[142]

for

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(a) Mo. 911. S. C. S. P. Cro. El. 587. Pl. 9. S. P. (b) Mo. 483. S. C. S. P. Cro. El. 763. S. P.

for fencing his own Corn he ſhall not pay Tithe for it; and ſo 'tis ſaid in the Parſon of *Mildenhall*'s Caſe, *Mo. Rep.* 683. And *Doctor and Student cap. ult.* ſays, That a County may preſcribe in a *non decimando* for a Thing certain, if the Parſon hath other ſufficient Maintenance. (a) And in 42 *El. Cro.* 736. *Auſtyn* and *Piggot*'s Caſe; and 12 *Jac. Cro.* 501. *Moore* againſt *Bullocke*: A Preſcription that the Parſon had ſuch Land in Lieu of Tithes, is adjudged a good *Modus*. (b) And *Piggot* and *Herne*'s Caſe, *Cro. El.* 599. cited in the Biſhop of *Winchester*'s Caſe, *Co.* 2. 45. The Lord of a Manor may pay the Parſon 6 *l. per Annum*; and therefore *ad decimam garbam* is a good Preſcription; all which Caſes prove, that if the Parſon hath a Recompence, it is no Matter whether the Party who receives Benefit by the *Non decimando* pays towards it or not: And in the Caſe at Bar, it was all one to the Rector whether the Corn was the Plaintiff's, or belonged to any other Perſon, ſo long as he had the Tithe of it, and therefore the Plaintiff hath no Loſs thereby. Then in this Caſe the Plaintiff hath not [183] more but leſs Benefit by giving them to his Neighbours to encloſe their Corn than if he had encloſed his own: But if he had ſold the Wood, or made any Benefit of it, then it would be reaſonable that he ſhould pay Tithe thereof; but the contrary is expreſly averr'd; and ſo the Plaintiff hath no Benefit, nor the Defendant any Loſs by the giving the ſaid Wood to encloſe the Corn, whereof the Defendant hath the Tithe; and if the Plaintiff had uſed the Wood in repairing the Fences of his own Corn, it is evident that had been a good Preſcription: And this Caſe don't differ from it in Effect, for here the Defendant hath the ſame Benefit that he would have had if the Corn had been the Plaintiff's, wherefore it was prayed that the Prohibition ſhould ſtand. But the whole Court, without any Regard thereto, adjudged the Preſcription ill, and that the Plaintiff could not give his Wood to any Perſon to incloſe Corn without paying Tithe thereof; and ſo it was adjudged, and a Conſultation awarded. *Quod nota. Wylde* Serjeant and *Saunders* of Counſel with the Plaintiff. *Nota*, That *Wylde* told me afterwards, That it was a Caſe deſerved greater Conſideration than the Court took thereon, and he did not think the Court would have given Judgment ſo ſuddenly.

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[144] DE

Termino Paſchæ.

Anno Regni Regis Car. II. 20.

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[149] Wade *againſt* Bache.

1 Sid. 360. 2 Keb. 341.

DEBT on Bond dated 26 *January* 1653. The Defendant prays *Oyer* of the Condition, which is, That if the Defendant at the next Court of *Wimbledon in Com. Surrey* ſurrender to the Uſe of the Plaintiff and his Heirs, a Copyhold Meſſuage *cum pertin'* in *Mortlack* in the ſaid County, Parcel of the ſaid Manor, and procure the Plaintiff to

be admitted Tenant thereof, according to the Cuſtom of the ſaid Manor; *And alſo if the ſaid Plaintiff ſhall and may have and enjoy the ſaid Meſſuage without any Let, Suit or Interruption of the Defendant, and of one* Lancelot Simons *Eſquire, or either* [150] *of them, or any other Perſon claiming any Eſtate, Right, Title, or Intereſt under them, or either of them; Then,* &c. And on *Oyer* the Defendant pleads, That he ſurrendered at the next Court, and procured the Plaintiff to be admitted; and that the Plaintiff had quietly enjoyed the ſaid Meſſuage without Inrerruption, *&c.* according to the Form of the Condition, *&c.* The Plaintiff replies, That the ſaid Meſſuage is, *& a tempore cujus &c.* was Parcel of the Manor, and demiſed and demiſable by Copy of Court-Roll in Fee, for Life or Years, at the Will of the Lord according to the Cuſtom, and that before the making of the Bond Sir *Edward Cecil* was ſeiſed in Fee of the Manor, whereof, *&c.* and at a Court of the Manor, *tent.* 8. *April* 22 *Jac. Regis*, granted this Meſſuage by Copy of Court-Roll to one *Patience Huſſey* for her Life, the Remainder to the ſaid *Lancelot Simons* in Fee, whereby the ſaid *Patience* entered and was ſeiſed for Life, the Remainder to the ſaid *Lancelot Simons* in Fee; and that afterwards before the making of the Bond, *ſcilicet*, at a Court of the Manor held 7 *Aug. Anno Regni Regis Caroli primi* 17. the ſaid *Lancelot* ſurrender'd his Remainder in the ſaid Meſſuage to the Uſe of the ſaid *Patience* for her Life, *Et poſt ejus Deceſſum* to the Uſe of the ſaid *Lancelot* and *Jane Simons*, then his Wife, for their Lives, and the Life of the longer Liver of them; and after their Deaths to the Uſe of the Heirs and Aſſigns of the ſaid *Lancelot*; and that the ſaid *Lancelot* and *Jane* were accordingly admitted, and that the ſaid *Lancelot Simons* and *Patience* afterwards died: And the Plaintiff further ſays, That after the making of the Bond, and after the ſaid Surrender made by the Defendant, *ſcilicet* 15. *Februarii Anno Regni Regis nunc* 19. the ſaid *Jane Simons clamans jus & titulum ad Meſſuagium præd. cum pertin. pro Termino vitæ, Virtute* of the Surrender made by the ſaid *Lancelot* enrered on the Poſſeſſion of the ſaid Plaintiff, and expelled him from his Poſſeſſion *inde. Et fuit & adhuc ſeiſit' exiſtit inde in Dominico ſuo ut de libero Tenemento pro Termino vitæ ſuæ ad Voluntatem Domini ſecundum conſuetudinem Manerii præd', Et hoc, &c. Unde, &c.* On which Replication the Defendant demurrs ſpecially Law, and ſhews for Cauſe, That it don't appear by the Replication that the ſaid *Jane* had any Title to the Meſſuage in Queſtion: And it was argued by *Winnington* for the Defendant, That the Surrender by *Lancelot Simons* to the Uſe of *Patience Huſſey* for her Life, was void, becauſe ſhe had an Eſtate for her Life before. *Et ex conſequenti* the Remainders limited after this particular Eſtate, which is void in the Creation, are likewiſe void; and then the Surrender enures to the Uſe of the ſaid *Lancelot Simons* and his Heirs as it was before, and the ſaid *Jane Simons* takes nothing by the Surrender. And he ſaid, That [151] Copyhold Eſtates ſhall be regulated by the Rules of the Common Law as to Grants, Surrenders and Eſtates in Remainder, *&c.* unleſs there is a Special Cuſtom to the contrary: And for that he cited *Cro. El.* 297. *Cro. Jac.* 376. *Bul.* 2. 272. (a) That a Surrender of a Copyhold in Fee *a tempore mortis* is void, as it would be on a Grant or Feoffment of a Freehold at Common Law; and then he ſaid, That the firſt Eſtate in this Caſe being void, there is nothing to ſupporr the Remainders, and ſo they are all void. And that the firſt Eſtate limited to *Patience Huſſey* was void, he relied on *Cholmley*'s Caſe, *Co.* 2. *Rep.* 50, 51. where it appears that if the Remainder be limited to a Man for the Life of the Tenant for Liſe, the Remainder is good for this Reaſon only, *viz.* becauſe it may poſſibly happen that the Tenant for Life will alien in Fee, and ſo forfeit his Eſtate; whereby he in Remainder may enter for the Forfeiture, and ſhall enjoy the Eſtate during the Life of Tenant for Life who had ſo forfeited; but this Reaſon doth not hold in Copyholds; for if a Tenant for Life of a Copyhold commits a Forfeiture of his Eſtate, the Lord of the Manor ſhall take Advantage thereof, and not he who hath the Remainder or Reverſion of the Copyhold, as it is adjudged in *Margaret Podger*'s Caſe, *Co.* 9. 107. a. And ſo he concluded that the firſt Eſtate being void, all the Remainders were likewiſe void, and

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(a) 4 Leon. 8. Cro El. 24, Godb 451, 264. 1 Bul. 172, 173, &c. 1 Roll.R. 109, 137, 253.

Jane Simons had no Title, and ſo the Replication had aſſign'd no Breach; wherefore he prayed Judgment for the Defendant. *Jones* and *Saunders* for the Plaintiff argued, That the Eſtate limited to *Jane Simons* was good, notwithſtanding the Eſtate limited to *Patience Huſſey*, was void; and that by way of preſent Eſtate, and not by way of Remainder; (a) for they ſaid, That a Surrender is in the Nature of a Deed-Poll rather than of an Indenture, and enures by Way of Limitation of Uſe; and ſo *Lancelot Simons* hath limited an Eſtate to himſelf and his Wife, which he could not do by Conveyance at Common Law: And Surrenders and Admittances have been often times conſtrued and taken contrary to the Rules of Conveyances at Common Law; as in *Cro. El.* 323. *Cro. Jac* 434. The Husband takes Copyhold Lands of the Lord, *cui Dominus conceſſit Seiſinam, habend'* to the Husband and Wife; this is a good Grant to the Wife, tho' ſhe is named after the *habend'*; And the Wife by theſe Words takes a preſent Eſtate with her Husband, which ſhe cannot do by a Conveyance at Common Law; and ſo the Surrender is to be conſtrued as a mediate Settlement on the Husband and Wife; (a) and in ſuch Caſes the Law hath always made ſuch Conſtruction *ut res magis valeat*, as in *Dyer* 376. *Cro. El.* 323. A Grant of a Reverſion *cum poſt mortem* of the Tenant for Life *acciderit*, is adjudged a [152] good Grant *in preſenti* of the Reverſion, notwithſtanding the Words ſeem to be otherwiſe: And ſo it ought to be taken in thss Caſe, That the Intent was, that *Jane* and *Lancelot* ſhould have the Meſſuage jointly for their Lives in Poſſeſſion, after the Death of *Patience* the Tenant for Life, as by a mediate Settlement. And ſo was the Opinion of the whole Court; and that *Jane*'s Eſtate was good by way of a preſent Eſtate, but not by way of Remainder. And Judgment was given for the Plaintiff *una voce*.

(a) 2 And. 135.

Poph. 135, 156. 2 Ro. ab. 67. p. 18.

(b) 10 Co. 127. b. 2 Cro. 72. 3 Cro. 269. 1 Mod. 284. 2 Co. 63. a. Salk. 233.

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[153] D E

Term. Sanct. Trin.

Anno Regni Regis Car II. 20.

Eccleſton *and his Wife Executors of* Caſtle *againſt* Clipſham.

Hill. 19 & 20 *Car.* II. *Regis Rot.* 1296.

2 Keb. 335, 339, 347, 385.

(24) COvenant. The Plaintiffs declare, That by an Indenture Tripartite made 12. *die Aprilis Anno Regni Regis Car. Secundi* 17. between one *Tayler ex prima parte*, the Defendant *ex ſecunda parte*, and *Caſtle* the Teſtator of the Plaintiffs *ex tertia parte*, reciting, That whereas the Parties had contracted with his Majeſty or the Lords Commiſſioners of Prize Goods *ad emend. & capiend.* all Brandy Wines

Wines, which at the Day of the Contract, or at any Time after, before the firſt Day of *September* then next enſuing, ſhould be declared, adjudged or condemned by the Admiralty as lawful Price, or ſhould be by them ordered to be ſold, at ſuch Rates and Prizces, and on ſuch Conditions as in the ſaid Contract appears; 'twas declared, That all the ſaid Parties had an equal Intereſt in the ſaid Contract. *Et ſuperinde quilibet eorum reſpective pro ſe Executoribus & Adminiſtratoribus ſuis & pro ejus proprio actu ſive actis & pro tanto quant. ad ejus proprium officium Anglice* Duty *attinebat ſed non pro actu ſive Officio alterius convenit & agreavit ad & cum altero & alteris eorum reſpective & ejus & eorum reſpectivis Executoribus Adminiſtratoribus & Aſſignatis per eandem Indenturam modo & forma ſequen', viz.* That there ſhould be a joint Stock of 6000 *l.* raiſed equally by the Parties, and depoſited in the Hands of one *Hynton* a Goldſmith to be [154] diſpoſed of by the Parties, or any two of them. And that all the Prize Brandies ſhould be bought by them on their joint Account, and that none of the Partners during the Time of the Partnerſhip ſhould ſell, merchandize or trade in Brandy-Wines by himſelf only, or in Company with any other, but only on the joint Account, and that none of the Brandies which ſhould come to the Hands of any of the Parties ſhould be ſold without the Conſent of the others in Writing under their Hands, and that the Gain ſhould be equally divided, and the Loſs equally born between the Parties; and moreover that all the Money which ſhould be received by any of the Partners, ſhould be paid in to the ſaid *Hynton* by the Party who ſhould receive it, to be diſpoſed of as the joint Stock was before directed to be: *Proviſo* that there ſhould be no Advantage of Survivorſhip; but that the Executors or Adminiſtrators of any of the Parties who ſhould die, ſhould have the ſame Benefit and Advantage of the Partnerſhip, as the Party himſelf might have had if he had not died; and that an Account ſhould be given to ſuch Executors and Adminiſtrators of the Brandies and Debts due by them, within twenty Days after the Deceaſe of the Party dying. And the Plaintiffs aſſign for Breaches; 1. That the Defendant during the Partnerſhip had without the Aſſent of *Tayler*, and the ſaid *Caſtle* in his Life time, ſold ſeventy Tons of Brandy, which came to his Hands *Virtute Contractus præd.* to ſeveral Perſons to the Plaintiffs unknown. 2. That the Defendant had merchandiſed and traded in 200 Tons of Brandy *pro Compoto ſuo proprio Et non pro juncto Compoto pertin' ad Indenturam prædictam contra formam & effectum Indenturæ præd'.* 3. That the Defendant during the Copartnerſhip had received 22000 *l.* due for Brandies by him ſold on the joint Account, and that he had not paid in the ſame to the ſaid *Hynton* for the joint Account *juxta veram Intentionem Indenturæ præd'.* 4. That the ſaid *Caſtle* the Teſtator, during the Partnerſhip, made his Will, and the Feme Plaintiff Executrix, and ſuch a Day died, and that the Defendant had not given her any Account within the twenty Days after the Deceaſe of the ſaid *Caſtle*; whereupon the Plaintiffs brought their Action and had Judgment on this Declaration by Default, and a Writ of Inquiry was awarded, and Damages aſſeſſed intirely. And on the Return of the Writ in *Eaſter* Term laſt paſt, *Jones* and *Saunders* moved in Arreſt of Judgment. And *Jones* took an Exception to the Declaration, becauſe the ſecond Breach aſſigned is, That the Defendant had traded in 200 Tons of Brandy *pro Compoto ſuo proprio & non pro juncto Compoto, &c.* But don't ſhew whether the 200 Tons of Brandy were Prize Brandies received on the [155] joint Account, or others; for the Defendant might have traded with the Prize Brandies on his own Account, or with others; and that ought to be particularly ſhewn, becauſe if the Brandies were Prize Brandies, then Part thereof is contained within the firſt Breach for ſelling ſeventy Tons, which had come to his Hands on the joint Account; and ſo for this Uncertainty, the Damages being entirely aſſeſſed, he concluded, That Judgment ought to be given for the Defendant. *Saunders* took another Exception to the Declaration, becauſe the Plaintiffs had aſſigned ſeveral Breaches, *viz.* That the Defendant had ſold Brandies without Aſſent, had traded on his own Account, and had not paid the ſaid 22000 *l.* to *Hynton*; whereas

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whereas it appears, That the Covenant is joint with the Plaintiff's Teſtator, and with the ſaid *Tayler* who ſurvived; for altho' the Covenant is joint and ſeveral by the Words, yet the Intereſt and Cauſe of Action in this Caſe is only joint; for if the Defendant hath broke the Covenants as is by the Declaration ſuppoſed, the Damage to *Caſtle* the Teſtator and to *Tayler*, (a) is equally the ſame; and ſo they ought to have joined in the Action. And *Caſtle* the Plaintiff's Teſtator being dead, the Action ſurvives to *Tayler*, as in *Co.* 5. 18. *b.* *Slyngbye*'s Caſe; A Conveyance of a Rectory to two, and a Covenant with them *& cum eorum altero* that the Covenantor was *legitime ſeiſitus* of the ſaid Rectory, they ought both to join in an Action on this Breach, altho' the Words are *cum eorum altero*, becauſe the Intereſt of the Covenantees is joint and not ſeveral. But the Covenant that the Defendant will render an Account to the Executors of the Party dying, is a good ſeveral Covenant, and ſuable by the Plaintiffs alone, becauſe the Plaintiffs have a ſeveral Intereſt and Cauſe of Action therein, but not in the others; on which Points the Judgment was ſtay'd. And now this Term it being moved again, the Court was of Opinion againſt the Plaintiffs for both Cauſes, but no Judgment was given, for the Plaintiffs diſcontinued and brought a new Action. *Coleman* of Counſel with the Plaintiffs.

(a) 1 And. 55. Dyer 338. a. 3 Leon. 161. 5 Co. 9. a. 103. 0.

[156] [156] D E

Term. Sancti Mich.

Anno Regni Regis Car. II. 20.

[161] [161] Lenthal *Marſhal of the King's Bench againſt* Cooke.

1 Sid. 383. 1 Lex. 254. 2 Keb. 422.

DEBT on Bond brought by *Lenthal* Marſhal of the King's Bench againſt *Cooke*; The Defendant prays *Oyer* of the Condition, which it, *That if the above bounden* Algernoon Peyton *now Priſoner in the King's Bench in* Southwark, *do and ſhall from henceforth be and continue a true Priſoner in the Cuſtody, Guard and Safe-keeping of the above named* John Lenthal *Marſhal of the ſame Priſon, and in the Cuſtody, Guard and Safe-keeping of his Deputy, Officers and Servants, or ſome or one of them, until he ſhall be lawfully diſcharged, without committing any manner of Eſcape or Eſcapes during the Time of his Reſtraint. Then this preſent Obligation to be void, &c.* And on *Oyer* of the Condition, the Defendant pleads the Statute of 23 *H.* 6. *cap.* 10. of Bonds made to Sheriffs *Colore Officii*: And likewiſe that at the Time of the making of the Bond now brought into Court, and for a long Time before the ſaid Plaintiff was Marſhal of the King's Bench, and [162] that the ſaid *Peyton* at the ſame Time was a Priſoner under the Cuſtody of the

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ſaid Plaintiff in Execution, at the Suit of one *Edwyn Rich* on a Judgment of 404 *l.* Debt and Damages; and that the Defendant, together with the ſaid *Peyton* made the Bond aforeſaid *pro eaſiamento & favore* to be ſhewn by the Plaintiff to the ſaid *Peyton*, which the ſaid Plaintiff *colore Officii ſui prædicti pro cauſa prædicta cepit & acceptavit*, and ſo the Bond is void. The Plaintiff replies, That the ſaid Bond was made *pro meliore ſecuritate* of the Plaintiff, that the ſaid *Peyton* ſhould not eſcape, but remain a true Priſoner in his Cuſtody, and traverſes *Abſque hoc* that the Bond was made *pro eaſiamento & favore* to the ſaid *Peyton de Impriſonamento ſuo præd' dand. ſive demonſtr'. Et hoc parat. eſt verificare, &c.* On which Replication the Defendant demurs; and it was argued for the Defendant, That this Bond was void by Force of the ſaid Statute of 23 *H.* 6. *cap.* 10. (a) For it is agreed by all that the Marſhal of the King's Bench is within the Words of the Statute of Gaolers and Keepers of Priſons: Then when the Plaintiff being Marſhal, took this Bond of his Priſoner on the Condition to be a true Priſoner, *Res ipſa loquitur* that it was for Eaſe and Favour, for it could be to no other Purpoſe; for the Marſhal is thereby ſecured, tho' he leaves open the Priſon-Door, and the Priſoner may go at large when he will; and this Caſe differs not in Subſtance from the Caſe of *Dive* and *Manningham*, *Plo.* 60. for there the Bond was to ſave harmleſs from Eſcapes; and here 'tis, That the Priſoner ſhall not eſcape, and the Bond is forfeited in this Caſe if he doth eſcape, and then the Plaintiff will be ſaved harmleſs from this Eſcape by Force of this Bond, as well as if the Condition had been preciſely to ſave harmleſs. And the Statute intended to prohibit all Bonds whereby Gaolers ſhall be encouraged to give any Eaſe or Favour to their Priſoners, which is a great Cauſe of the Non-payment of their Debts: And altho' the Defendant in this Caſe ſeems by his Demurrer to confeſs that the Bond was not made for Eaſe and Favour; yet it plainly appears that 'twas made for none other Purpoſe, for the Conſequence is all one as if it had been expreſly alledged in the Condition to be for Eaſe and Favour, for now the Marſhal is induced to take leſs Care to keep his Priſoner and to let him eſcape if he will, as in this Caſe he hath, for 'tis now all one to the Marſhal, he being ſecured the one Way or the other, *viz.* Whether he doth or doth not eſcape: And if this Bond ſhall be good, 'tis a Trick to avoid the Statute. Much more was ſaid to this Purpoſe to prove the Bond was void, for which Reaſon Judgment was prayed for the Defendant. And on the other Side it was argued for the Plaintiff, That this [163] Bond was good and not void by the Statute, becauſe (as 'twas ſaid) all Bonds taken by a Sheriff or Gaoler are not void; but thoſe only which are taken *colore Officii*, or *pro eaſiamento & favore*; for a Bond taken by a Gaoler of his Priſoner for a juſt Debt due to him, is not within the Statute. And here the Bond might be made to a good Intent, *ſcil'* that the ſaid *Peyton* ſhould continue to be a true Priſoner, as by Law he ought, and ſo without any Deſign or Intention of Eaſe or Favour to be ſhewn him, as if the Priſoner had entered into ſuch Bond to a Stranger without the Marſhal's Conſent, it had been good, if there was not a precedent Agreement *pro Eaſiamento & Favore*: And it don't in this Caſe appear, that there was any ſuch Agreement, but the contrary, for the Plaintiff hath travers'd it in his Replication, and the Defendant hath confeſs'd the Replication to be true by his Demurrer; and ſo it appears on the Record, That this Bond was made on a lawful Intent, and not *pro Eaſiamento & Favore*, or for any other Purpoſe contrary to the ſaid Statute. And the Caſe of Sir *George Reynol* againſt *Elworthy*, *Latch.* 23 & 143. was cited and relied upon, and chiefly the Caſe there cited of Sir *Thomas Perrier* entered *Hill.* 19 *Jac. Regis Rot.* 1202. which Roll was now produced and read in Court; and it appeared that the Condition was as the Condition is here; but there was an Iſſue on the Eaſement and Favour, and found for the Plaintiff, That the Bond was not for Eaſe and Favour; and thereupon the Plaintiff in that Caſe had Judgment, wherefore Judgment was alſo prayed for the Plaintiff in this Caſe: And altho' the Court at firſt doubted, yet on the reading that Record, they immediately gave Judg-

(b) Cro. El. 66. Poph. 165. Dy. 324. 2.

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ment for the Plaintiff without any Day given over. *Powys* of Counſel with the Plaintiff, *Jones* and *Saunders* with the Defendant.

[169] Skinner *againſt* Andrews.

1 Sid. 370. 1 Lev. 245. 2 Keb. 361, 388.

DEBT on Bond *dat.* 8 *Febr. Anno Regni Regis nunc* 19. The Defendant craves *Oyer* of the Condition, which is, That if the Defendant performs the Award of *Lawrence Blancard, Thomas Raſtal* and *Robert Jeffryes, or any two of them*, &c. *ſo as the ſaid Award be made*, &c. *upon or before the Sixteenth Day of* March *next enſuing*, &c. *Then*, &c. The Defendant pleads no Award made. The Plaintiff replies, That *Blancard* and *Raſtal*, two of the Arbitrators *poſt confectionem ſcripti Obligatorii prædicti & ante exhibitionem Billæ Quer' ſcilicet prædicto* 16. *die Marcii Anno* 19. *ſupradicto* made their Award on the Premiſſes, and thereby awarded the Defendant to pay Money to the Plaintiff; and that on Payment thereof, the Parties ſhould give mutual Releaſes; and aſſigns the Breach in Non-payment of the Money, *&c.* To which the Defendant demurs; and *Jones* of Counſel with the Defendant, took an Exception to the Replication, becauſe 'twas not preciſely averr'd that the Award was made on or before the 16th Day of *March* according to the Condition; but the Plaintiff had only alledged it by a *ſcilicet*, which is not traverſable; for the Plaintiff hath ſaid in his Replication, That the two Arbitrators *poſt confectionem ſcripti Obligatorii prædicti & ante exhibitionem Billæ ſcilicet prædicto* 16 *die Marcii* made their Award; whereas he ought to have ſaid, That the two Arbitrators *poſt confectionem ſcripti Obligatorii prædicti & ſuper* the ſaid 16 Day of *March* made their Award without a *ſcilicet*; For he ſaid, That a *viz.* or a *ſcil'* is not in any Caſe traverſable, for if it is repugnant to the preceding Matter, it is altogether void; and if it is not repugnant to the preceding Matter, yet it ſerves only to explain and not enlarge it, or to make it bear another Senſe than it of it ſelf imports. And here whether the Award be made on or before the 16 Day of *March*, is Matter of Subſtance, which ought to be preciſely alledged, and is traverſable by the other Party; for the Award may be made before the exhibiting of the Bill, and yet not before or upon the ſaid 16th Day of *March*; and ſuch Award ſo made will not conclude the Defendant; and ſo he concluded that the Replication was ill. And afterwards at another Day it was moved by *Maynard* the King's Serjeant, and *Saunders* for the Plaintiff, That the Replication was good, notwithſtanding the Exception taken by *Jones*; (a) And they agreed, That a *videlicet* or *ſcilicet* which is repugnant to the Matter preceding, is altogether void: But they ſaid, [170] That where a *ſcilicet* is not repugnant to the preceding Matter, but agrees with it, there the (*viz.* or *ſcil'* is a direct Affirmation, and ſhall be taken poſitively, as in *Hob. Rep.* 172. *Studley* and *Butler's* Caſe, a *videlicet* will make a Reſtriction where the Words are general, and that ought neceſſarily to be poſitive, and by Way of a direct Affirmation, for otherwiſe it can't do ſo. And the Caſe in *Cro.* 19 *Jac.* 619, 620. *Treſwallen* againſt *Kyne* is directly in Point; for there the Plaintiff declared, That in Conſideration he at the Defendant's Requeſt would travel with him from *Devonſhire* to *London* to ſearch for a Will, the Defendant promiſed to pay him 4*l.* And the Plaintiff averred, That *poſtea ſcilicet* 15 *Aprilis* 18 *Jac. Regis* he perform'd the Journey, whereupon he brought his Action for the 4*l.* The Defendant there pleaded, That before the Journey, *ſcilicet* 16 *Aprilis* 18 *Jac. Regis* he diſcharged the Plaintiff from his Journey; and the Plea was adjudged ill, becauſe the Journey was alledged to be the 15th of *April*, and ſo before the 16th being the Day of the Diſcharge, and then the Defendant had not anſwered it. And the Court in that Caſe took the *ſcilicet* to be a direct Affirmation of the Day of the Journey performed, for otherwiſe the Defendant's Plea as to that Matter had been ſufficient. And the whole Court in this Caſe were of Opinion, That the *ſcilicet* was ſufficient, and that the Matter was poſitively enough alledged thereby, and ſaid that they would not intend, but that the Award

[170] (a) Cro. Jac. 97, 428, 550, 618. Cro. El. 464. Yelv. 94. Hob. 172. 2 Ro. R. 135. Salk. 325. Dy. 240. b. 241. a. 304. b. 305. a. Cro El. 97. Savil 71. Lut. 26, 424, 428, 558, 561.

was made on the Day mentioned in the *ſcil'*, that is to ſay, on the ſaid 16th Day of *March* according to the Condition, and on no other Day. *Et per totam Curiam* the Plaintiff had Judgment.

[180] Cook *againſt* Gerrard.

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Ejectione firmæ. And declares, That *Thomas Kempe* 20 *Octob. An. Reg' Regis nunc* 16. demiſed to the Plaintiff ſeveral Meſſuages, Lands and Tenements in *Finchingfield parva & Sampford parva in Com' Eſſex Habend' a Michaelmas* then laſt paſt for five Years, by Force of which Demiſe the [181] Plaintiff entered and was poſſeſſed till the Defendant ejected him, to his Damage, *&c.* On not Guilty, the Jury found a Special Verdict to this Effect, *viz.* That before the Treſpaſs and Ejectment Sir *Robert Kempe* Knight, was ſeiſed of the Lands in Queſtion *(inter alia)* in his Demeſne as of Fee, and being ſo ſeiſed 13 *Octob. Anno* 14 *Regis nunc* made his Will in Writing, which is found *in hæc verba*, whereby he deviſed *(inter alia)* as followeth, ſſ. *I do will and deviſe, That my loving Wife, Dame* Elizabeth, *have the free Uſe of my Manor-houſe called* Spains-Hall, *with the Orchard and Garden thereunto belonging* (being the Lands in Queſtion) *for the Space of one whole Year next after my Deceaſe; and my further Will and Meaning is, That in Caſe I ſhall happen to die, leaving my Wife with Child, and the ſame Child be a Son, Then I do will and deviſe my Manor-Houſe called* Spains-Hall, *and all my Lands and Tenements thereto belonging, and all my Lands in* Eſſex (*except the Manor of* Jekyls, and ſome other Lands in the Will expreſs'd) *to my ſaid after-born Son and his Heirs and Aſſigns for ever.* And then he made Proviſion for the *after-born Child*, in Caſe it ſhould be a Daughter by a Deviſe of the Manor of *Jekylls* to her and *Mary Kempe* his Grand-daughter in Fee; but in Caſe he ſhould have no *after-born Child*, then he deviſed the entire Manor of *Jekylls* to *Mary* his Grand-daughter in Fee. And then follows the Clauſe on which the Controverſy aroſe, ſſ. *And becauſe I am very deſirous to continue the Poſſeſſion of the Capital Meſſuage called* Spains-Hall *in* Finchingfield *aforeſaid, and of divers Lands thereunto belonging in the Name and Blood of the* Kempes, *ſo long as it ſhall pleaſe Almighty God, in Caſe I leave no Heir male of my Body lawfully begotten, in which Name and Blood it hath continued for many Ages paſt. And in Purſuance of a Promiſe and Engagment by me heretofore made to my late dear Uncle* William Kempe *Eſquire, deceaſed, for the Purpoſe aforeſaid, when he gave the ſame to me. I do therefore hereby will, give and deviſe the ſaid Capital Meſſuage called* Spains-Hall, *and Lands aforeſaid in Manner and Form following, Item, I give and bequeath unto my loving Kinſman* Thomas Kempe *Citizen and Draper of* London (who is the Leſſor of the Plaintiff) *all that my ſaid Capital Meſſuage called* Spains-Hall, *and all the Lands thereunto belonging, and all other my Lands, Tenements and Hereditaments whatſoever, with their and every of their Appurtenances in* Finchingfield *aforeſaid, and* Sampford *in the ſaid County of* Eſſex, *not heretofore by my laſt Will and Teſtament willed and deviſed, or otherwiſe ſettled and diſpoſed of by any Act by me heretofore lawfully* [182] *executed, To have and to hold all and ſingular the ſaid Capital Meſſuage called* Spains Hall, *and all other the before-mentioned Premiſſes, with their Appurtenances, unto the ſaid* Thomas Kempe, *immediately from and after the Expiration of one whole Year next after my Deceaſe, and the Deceaſe of* Ruth Kempe *my Daughter in Law, for and during the Term of his natural Life, doing no Strip nor Waſte. And after the Deceaſe of the ſaid* Thomas Kempe, *I will, give, and deviſe the ſame Premiſſes to* Thomas Kempe, *eldeſt Son of the ſaid* Thomas Kempe, *by* Elizabeth *his now Wife for the Term of his natural Life, doing no Strip nor Waſte*, with the Remainder over in Tail to the Heirs Males of *Thomas* the Son, Remainder over in Tail to the Heirs Males of *Thomas* the Father, with a Limitation over to the right Heirs Males of the Deviſor; And they further find, That the ſaid *Ruth Kempe* Widow, the Daughter in Law of the ſaid Deviſor, and late the Wife of one *William Kempe* Eſq; the only Son and Heir apparent (*dum vixit*) of the Deviſor, ſurvived her Husband, and was in full Life; and that the ſaid *Ruth* at the

1 Lev. 212. 2 Keb. 206, 224.

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the Time of making the ſaid Will, and at the Time of the Deviſor's Death, had ſeveral Lands and Tenements, (beſides the Lands in Queſtion which belonged to the Capital Meſſuage) ſettled on her for her Jointure, for the Term of her Life (of the Reverſion whereof the ſaid Deviſor was ſeiſed in Fee at the Time of the Will and of his Death,) And moreover that the ſaid *William Kempe dum vixit* was the only Son and Heir of the Deviſor's Body, and that the ſaid *William Kempe* had Iſſue of his Body, a Daughter, *ſcil'* the ſaid *Mary Kempe*, who is the Deviſor's Heir; and that the ſaid *William* died in the Deviſor's Life-time; and that the Deviſor died ſo ſeiſed without any other Iſſue; and that the Leſſor of the Plaintiff and *Thomas Kempe* named in the Will is the ſame Perſon, and that the ſaid Leſſor of the Plaintiff after a Year after the Deviſor's Death entered into the Meſſuage called *Spains-Hall*, and the other Lands thereto *belonging*, being the Lands deviſed to *Elizabeth*, and which were not in Jointure to *Ruth*, nor otherwiſe diſpoſed of by the Deviſor, and was ſeiſed *prout Lex, &c.* And being ſo ſeiſed, demiſed them to the Plaintiff for the Term mentioned in the Declaration, who entered and was poſſeſſed, till the Defendant by the Command of the ſaid *Ruth* and *Mary*, who was the Heir at Law, entered upon him and ejected him *prout* the Plaintiff had declared: But whether the Defendant was guilty of the Ejectment or not, they left to the Judgment of the Court; and if the Court ſhould adjudge *pro Querente*, they found for the Plaintiff, and gave Damages and Coſts; And if the Court ſhould adjudge *pro Defendente* they found for the Defendant. And this Caſe was argued in the
[183] King's Bench by *Jones* for the [183] Plaintiff, and by *Conyers* of the *Middle Temple* for the Defendant; and the Caſe on the Verdict was opened in this Manner ſſ. Sir *Robert Kempe* Knight, was ſeiſed of the Lands in Queſtion in Fee, and was alſo ſeiſed of the Reverſion of other Lands expectant on the Death of *Ruth Kempe* his Daughtet in Law (whereof *Ruth* had an Eſtate for her Life for her Jointure) and ſo ſeiſed the ſaid Sir *Robert Kempe* by his Will in Writing deviſed, That Dame *Elizabeth* his Wife ſhould have the Demeſne Lands (being the Lands in Queſtion) for a Year after his Death, and then he deviſed the Demeſnes and the Reverſion together to the Leſſor of the Plaintiff, *Habendum immediately from and after the Expiration of one whole Year* next after his Deceaſe, and the Deceaſe of the ſaid *Ruth Kempe*, who was Tenant for Life of the Reverſion Lands, during the Life of the ſaid *Thomas Kempe* the Leſſor of the Plaintiff, *doing no Strip nor Waſte*, and whether *Thomas Kempe* the Leſſor had the demeſne Lands immediately after the Year expired, or had nothing till the Death of the ſaid *Ruth*; and whether the demeſne Lands deſcended to the Heir in the mean time? was the Queſtion; for if he ought to ſtay till the Death of *Ruth*, then the Plaintiff and his Leſſor hath no Title, for the ſaid *Ruth* was found to be alive. And *Jones* for the Plaintiff argued, That *Thomas Kempe* the Plaintiff's Leſſor was entitled to the demeſne Lands (being the Lands in Queſtion) immediately after the Year expired; for altho' the Words of the Will are joint, *ſcil Habend' immediately from and after the Expiration of one whole Year after my Deceaſe, and the Deceaſe of my Daughter in Law* Ruth Kempe, yet he ſaid the Words ſhall be taken *diſtributive & reddendo ſingula ſingulis, viz.* That the Deviſee *Thomas Kempe* ſhall have the demeſne Lands immediately *from and after the Expiration of the Year*, and the Reverſion Lands *from and after the Deceaſe* of the ſaid *Ruth*
* 2 Leon. 106. *Kempe*; and on this Point he cited ſeveral Books, **viz. Cro. El.* 199. *Veale* againſt *Roberts*, *Stephens* was ſeiſed of two cuſtomary Meſſuages with Lands thereunto *belonging*, and *Heydon* was ſeiſed of two others with Lands thereto belonging; and *W.* and *W.* were poſſeſſed of ten Acres called *Normors*, being the Lands in Queſtion; all which were Parcel of the Poſſeſſions of the Abbey of *Glouc'*. The Abbot and Convent demiſed for Years to *John Veal* all the ſaid Meſſuages and Lands thereunto *belonging*, *necnon* the ſaid Lands called *Normors*, *Habend'* the ſaid Meſſuages and Lands, *necnon* the ſaid Lands called *Normors*, *a tempore mortis ſurſ. reddit' forisfact' aut determinationis ſtatus & termini præd.* of the ſaid *Stephens*, *Heydon & W. & W.* yielding a
[184] Rent; the Eſtate of the ſaid *W. & W.* in [184] *Normors* expired, and the other Eſtates were *in eſſe*; And it was adjudged that the Term granted to

John Veale ſhall commence immediately in *Normors*, and ſhall not expect till the Determination of the other Eſtates, and that the *Habend'* ſhall be interpreted *diſtributive reddendo ſingula ſingulis*, †*Cro. Jac.* 259. *Aylor* againſt *Chep*, A Man deviſed Lands to his two Sons, and the Heirs of their two Bodies, and that his Executor ſhould have the Lands *until they came to their ſeveral Ages of one and twenty Years*; one of them attains his Age of twenty-one Years and enters, and adjudged that he might, altho' the other had not attained his Age, becauſe the Words of the Will ſhall be taken *diſtributive reddendo ſingula ſingulis*, and ſo they ſhall enter into their Parts ſeverally, as they ſhall reſpectively attain their Age; ſo ‖ *Cro. Jac.* 655. *Gilbert* againſt *Witty & al'*, The Deviſor had three Sons, and deviſed a Meſſuage to the 1ſt Son and his Heirs, and another Meſſuage to the 2d Son and his Heirs, and a third Meſſuage to the 3d Son and his Heirs, *Provided always, That if all my ſaid Sons die without Iſſue of their Bodies lawfully begotten, Then all my ſaid Meſſuages ſhall be and remain to* Margery *my Wife, and her Heirs for ever*; two of the Sons die without Iſſue, the third Son ſurvives and hath Iſſue; yet it was adjudged that the Wife ſhould have the Meſſuages deviſed to the two Sons, who were dead without Iſſue immediately after their reſpective Deceaſes, altho' the Words were, *That if all my Sons die, then all my Lands ſhall remain, &c.* And Juſtice *Wyndham*'s Caſe, *Co.* 5. 7. had the ſame Conſtruction as *Veale* and *Robert*'s Caſe before, and yet that was in a Deed which is not ſo favourably conſtrued as a Will; for in a Will it ſhall be conſtrued as near the true Meaning as may be: And he argued, That the true Meaning of the Will in Queſtion was as he had interpreted it: For 1. It appears by the Will that the Teſtator intended that the Lands deviſed ſhould remain in his Name; but if they ſhall *deſcend* to *Mary Kempe* his Grand-daughter and Heir, altho' ſhe is of the Name of *Kempe* at preſent; yet by common Intendment ſhe will change her Name by Marriage, and then the Deviſor's Intent will not take Effect; and the Deviſor hath otherwiſe provided for his ſaid Grand-daughter and Heir by the Deviſe of the Manor of *Jekylls* and other Lands. 2. It appears by the Will That *Kempe* the Deviſee immediately after the Deceaſe of *Ruth*, is to pay out of the Jointure-Lands 20 *l. per Annum* to one *Robert Outlaw* the Deviſor's Godſon, for his Life, at *Lady-day* and *Michaelmas*: Now if the ſaid *Ruth* had died within the Year after the Teſtator, the ſaid 20 *l. per Annum* ſhould not be paid, unleſs the Deviſee ſhall have them immediately after the Deceaſe of [185] *Ruth*, altho' the Year was not expired; and therefore it ought to be conſtrued, that the Deviſee ſhall have the Jointure-Lands immediately after the Deceaſe of *Ruth*, and ſhall have the demeſne Lands immediately after the Expiration of the Year, after the Teſtator's Deceaſe; for otherwiſe the 20 *l. per Annum* will not be paid immediately after the Deceaſe of *Ruth* by the Deviſee, if *Ruth* had died within the Year, which is directly contrary to the expreſs Words of the Will. 3. The Deviſor provided by his Will, that there ſhould be no Waſte or Strip committed by the Deviſees, but would have it kept entire without Spoil to continue in his Name; but if the demeſne Lands ſhall deſcend to the Heir in the mean time till the Death of *Ruth*, the Heir may commit what Waſte he pleaſes, and there will be no Way to prevent it, which will be alſo directly againſt the Will and the true Meaning of the Deviſor: And for thoſe Reaſons and Cauſes he prayed Judgment for the Plaintiff. *Conyers* for the Defendant put the Caſe, and it ſeem'd to him, That the Plaintiff ought to be barred, becauſe (as he held) the Leſſor of the Plaintiff being the Deviſee, ſhall take nothing before the Death of *Ruth*, and the Expiration of the Year, but that the demeſne Lands after the Expiration of the Year, ſhall deſcend to the Heir at Law till the Death of *Ruth*; and that the Words of the Will ſhall be taken as they are, *viz.* joint and not *diſtributive*: For he argued, That the Words in a Will, which diſinherits the Heir at Law, ought to be very perſpicuous and clear; for if they are dubious (as here) they ought to be interpreted for the Benefit of the Heir, and not to diſinherit him; and thereupon he put ſeveral Caſes, and as to the Caſe of *Gilbert* and *Witty* before-cited, he ſaid, That there the Conſtruc-

† Yelv. 183. 1 Brownl. 147.

‖ 2 Ro. R. 281.

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ction that the Wife ſhall take the Meſſuages deviſed to the ſaid two Sons, who died, immediately after their Deceaſes was *propter neceſſitatem*, becauſe the Judges could not make croſs Remainders, and for that Reaſon only, they adjudged that the Wife ſhould take immediately after the Deceaſes of the Sons, becauſe there was no other to take it; and he aſſign'd, that here was no Deviſe to the Wife of *Spains-Hall* and the demeſne Lands *omnino*, but only the free Uſe thereof, and thoſe Lands deſcend to the Heir at Law; and ſo 'tis but an executory Deviſe to the Leſſor of the Plaintiff to commence at a Time to come, *& interim* it will deſcend to the Heir, which may take Effect as well after the Death of *Ruth* as before, for there was no precedent Eſtate deviſed to direct it; and he relied on the Caſe in *Moore's Reports, fol.* 7. A Man ſeiſed of a Manor, Parcel in Demeſne, and Parcel in Service, by his Will deviſed to his Wife all his demeſne Lands for her
[186] Life; and alſo by the ſame Will deviſed to her all the Services and [186] chief Rents for fifteen Years; and alſo deviſed to another the whole Manor after the Death of his Wife; and 'twas adjudged, that the Deviſee ſhould take nothing till after the Death of the Wife, altho' the fifteen Years expired; and that the Heir, after the fifteen Years elapſed, ſhould have the Services and chief Rents during the Life of the Wife, and therefore he pray'd Judgment for the Defendant: But the Court without any Difficulty delivered their Opinion for the Plaintiff, and that the Words in the Will ſhould be taken *diſtributive*, and that the Leſſor of the Plaintiff had a good Title to the demeſne Lands after the Year expired, and before the Death of *Ruth*; wherefore Judgment was given for the Plaintiff *in Termino Paſchæ Anno Regni Regis nunc* 19. Upon which the Defendant brought a Writ of Error in the Exchequer-Chamber, and now this Term 'twas argued again by *Finch* Sollicitor General, for the Plaintiff in the Writ of Error, and by *Wyndham* Serjeant and *Saunders* for the Defendant. And the Sollicitor General inſiſted much on the ſaid Caſe in *Moore's Rep.* to which *Saunders* gave this Anſwer, *viz.* That there the ſecond Deviſee was to take nothing by the Words of the Will, but after the Death of the Wife, and the Words being expreſs, no Conſtruction can be made againſt them, which he ſaid was the Reaſon of the Caſe; but he ſaid, That if the Will had been that the ſecond Deviſee ſhould have all the Manor after the fifteen Years, and after the Death of the Wife, then it ſhould be conſtrued diſtributively, as in this Caſe, *ſcil'* that the ſecond Deviſee ſhould have the demeſne Lands of the Manor after the Death of the Wife, and the Rents and Services after the fifteen Years expired. And the Court held, That by the Deviſe of the free Uſe of *Spains-Hall, &c.* the Intereſt in the Land paſt for a Year, for the free Uſe paſſes a Right to take the Profits for the Time limited by the Will. And the Judgment was afterwards affirmed, and the Record ſent back into the King's Bench.

[196] ## [196] Mounſon *againſt* Redſhaw.

Trin. 20 *Car.* II. *Rot.* 382.

REplevin by Sir *John Mounſon*, Knight and Baronet, againſt *Redſhaw*. The Plaintiff declares for taking and detaining ſix Tons of Allom *apud paroch' de Lyth in Com' Ebor'* in a certain Place called *Sandſend Allom-houſe* 10 *Marcii Anno Regis nunc* 19. The Defendant as Bailiff to Sir *John Mounſon ſen'*, Knight of the *Bath* and Baronet, makes Cognizance and ſhews, That the Place where, *&c.* is a Meſſuage *in quo confectio Aluminis uſitat. fuit*, and that long before the taking, *&c. Charles* the Firſt, late King of *England*, was ſeiſed of the Manor of *Mulgrave cum pertin' in Com' Eborum præd. unde* the Place where, *&c.* is and from the Time whereof, *&c.* was Parcel, in his Demeſne as of Fee in the Right of his Crown, and ſo ſeiſed 1 *Marcii Anno Regni ſui* 9. by Indenture under the great Seal, made between the late King and Sir *John Gibſon* Knight, enrolled of Record in Chancery, an Exemplification

of which Inrolment under the now Great Seal, the Defendant brings into Court *juxta formam Statuti, &c.* demiſed and granted to the ſaid Sir *John Gibſon* the ſaid Meſſuage *in quo, &c. inter alia* by the Name of all Alloms, Allom-works, and Allom-houſes within the Seigniory of *Mulgrave*, and all Pans, Pits, Ciſterns, Coolers, *&c.* to the Allom-works *belonging, &c. Habendum* after the End, Expiration or Determination of a Demiſe or Grant by Indenture *dat' 12 Maii Anno Regni dicti nuper Regis Caroli primi tertio* made by the late King to Sir *Paul Pinder* and *William Turner* Eſq; for the Term of twelve Years *a feſto Natalis Domini* 1625. *ac ad tertium diem Januarii tunc prox' uſque plenum finem & terminum* thirty-one Years and from thence to the 10 *February* then next to come *ſi præd. Alumen tam diu fact' & operat. foret infra præd. Manerium de Mulgrave vel infra aliquas alias terras Edwardi Comitis Mulgrave vel hæredum ſuorum infra Com' Eborum, Et quod non foret apparens ratio pro utiliori confectione Aluminis in aliquo al' loco infra Regnum Angliæ in judicio ſex habilium perſonarum quarum tres eligend'* by the ſaid *Gibſon* for the ſaid late King, and the other three to be choſen by the ſaid Earl of *Mulgrave*, his Heirs, Executors or Aſſigns; and if they could not agree, then the Lord Keeper of the Great Seal for the Time being ſhould direct ſuch Courſe *pro inveſtigatione veritatis* as he ſhould think fit, and ſo ſhould determine ſuch Queſtion ſo ariſing; by Force of which Demiſe the ſaid Sir *John Gibſon* was [197] poſſeſſed *de intereſſe termini præd'*, and ſo poſſeſſed afterwards *ſcilicet* 10 *Martii Anno Car. Primi nono ſupradicto* by his Indenture now brought into Court, made between him and *Thomas* Viſcount *Wentworth*, Deputy of *Ireland*, of the one Part, and Sir *Ferdinando Fairfax* Knight, Sir *John Wray* Knight and Baronet, Sir *William Armyn* Knight and Baronet, Sir *William Pelham* Knight, *William Anderſon* Eſq; and the ſaid Sir *John Mounſon* ſen. (in whoſe Right the Defendant makes Cognizance) of the other Part, granted to the ſaid Sir *Ferdinando Fairfax*, Sir *John Wray*, Sir *William Armyn*, Sir *William Pelham*, *William Anderſon*, and the ſaid Sir *William Mounſon* ſen. a yearly Rent of 1640 *l.* to be iſſuing out of the ſaid Place *in quo, &c. inter alia Habend', &c. annuatim & quolibet Anno pro & durante & uſque plenum finem & expirationem prædicti termini* 31 *an'* demiſed to the ſaid Sir *John Gibſon* with the ſame Limitation of *ſi præd' Alumen, &c.* as is before-mentioned in the Leaſe to the ſaid Sir *John Gibſon* to be paid at *Lady-day* and *Michaelmas* by equal Portions in the Common dining Hall of the *Middle-Temple*, with a Clauſe of Diſtreſs, if the Rent ſhould be in arrear for twenty Days. And then the Defendant avers, That the Term granted to Sir *Paul Pinder* and *Turner* on the ſecond Day of *January* 1637. *per effluxionem temporis finivit & expiravit*, whereby the ſaid Sir *John Gibſon* by Force of his Leaſe enter'd into the Lands and was poſſeſſed, and the Grantees were poſſeſſed of the ſame Rent, and that afterwards all the Grantees died except the ſaid Sir *John Mounſon* ſenior, who ſurvived them, *Et fuit inde ſolus poſſeſſionat. per jus accreſcendi, &c.* And ſo poſſeſſed the Defendant further ſaith, That 820 *l.* of the Rent aforeſaid, for half a Year ending at *Lady-day*, 1649. *& per ſpatium* 20 *dierum tunc prox' ſequen' necnon prædicto tempore quo, &c.* were in Arrear and unpaid, *per quod idem* the Defendant *ut Ballivus præfati Johannis Mounſon ſen. bene cogn' captionem prædictorum ſex doliorum Aluminis exiſten' valoris Centum librarum tantum & non amplius in prædicto loco in quo, &c. & juſte, &c. pro Centum libris parcell' de prædictis* 820 *l.* of the Rent aforeſaid *ſic aretro exiſten' in Meſſuagio præd. diſtrictioni* of the ſaid *Mounſon* the elder, *in forma præd' onerat. & obligat'*, and avers, That the ſaid Demiſe to *Gibſon* was in full Force, and that Allom was always made within the ſaid Manor of *Mulgrave*, and that *non fuit apparens ratio pro utiliori confectione Aluminis in aliquo alio loco infra hoc Regnum Angliæ in Judicio ſive determinatione aliquarum perſonarum ſive alicujus perſonæ quarumcunque, &c.* The Plaintiff prays *Oyer* of the Exemplification and of the Grant of the Rent brought into Court, which are entered *in hæc verba*, and by the Indenture from the King, the firſt Leaſe made [198] to Sir *Paul Pinder* and *Turner* under the annual Rent of 11000 *l.* to be paid by half-yearly Payments, is recited, and by the ſame Indenture 'tis likewiſe recited, That the ſaid Sir *John Gibſon* had offered, in Caſe his Majeſty would let the Allom-works, *&c.* to

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him

him to pay the Rent of 12500 *l. viz.* 10860 *l.* to his Majeſty, and 1640 *l.* to the ſaid Grantees above-named, who were nominated in Truſt for *Edward* Earl of *Mulgrave*, and the Heirs Male of his Body; which Offer his Majeſty accepting by the ſaid Indenture demiſed to the ſaid Sir *John Gibſon* as is alledged in the Cognizance, with a Prohibition therein contained, that no Perſon ſhould import Allom into *England* during the time of the Demiſe, and that no Perſon ſhould make Allom in *England* during the ſame Time, *Reddendo & ſolvendo inde annuatim* the Rent of 12500 *l. modo & forma ſequen', viz.* 10860 *l.* to the King his Heirs and Succeſſors, and 1640 *l.* to the ſaid Grantees before-named, being Truſtees for the ſaid Earl of *Mulgrave* and his Heirs Male of his Body *quamdiu non foret apparens ratio, &c.* as is ſhewn in the Avowry; and moreover by the Grant of the ſaid Rent to the Grantees, the Indenture from the King was recited, and that the ſaid Rent of 1640 *l.* was reſerved by the King for the Benefit of the ſaid Earl of *Mulgrave*, in Conſideration of his having conveyed the ſaid Manor of *Mulgrave* to the ſaid King, to the Intent to enable him to make the ſaid Demiſe to the ſaid Sir *John Gibſon*: Now to the Intent that the ſaid Rent of 1640 *l.* ſhould be well ſecured, and for the Payment thereof, the ſaid Sir *John Gibſon* granted to the ſaid Grantees, being in Truſt for the ſaid Earl and *Marian* his Counteſs, and for their three Sons *James*, *Thomas* and *Robert*, and for *Edmund* Lord *Sheffield*, Grandſon and Heir apparent to the ſaid Counteſs (as the Deed recited) the ſaid Rent of 1640 *l. per Annum*, with a Clauſe of Diſtreſs as is alledged in the Cognizance; and on *Oyer* of the Deeds, the Plaintiff pleads in Bar of the Avowry, *Quod conceſſio prædicti Redditus mille ſexcentarum & quadragint' librarum per prædictum Johannem Gibſon ut prefertur fact' fuit pro majore ſecuritate ſolutionis prædicti redditus mille ſexcentarum & quadraginta librarum per prædictam Indenturam per prædictum nuper Regem præfato Johanni Gibſon ut prefertur fact' in forma prædicta reſervat' & ſolubil' Quodque ante prædictum feſtum Annunciationis beatæ Mariæ Virginis Anno Domini* 1649. *ſcilicet* 31. *die Marcii Anno Domini* 1648. *Quedam perſonæ ſederunt apud Weſtm. in Com. Midd' ut Superior domus tunc Parliamenti, quodque prædictæ Perſonæ ſic ſedentes ut ſuperior domus Parliamenti prædicto* 31. *die Marcii Anno Domini* 1648. *ſupradicto apud Weſtm' præd' per nomina Dominorum in Parliamento aſſemblat' per ordinem ſuum Ordinaver' quod Indentura præd' in cognitione præd'* [199] *mentionat' inter dictum nuper Dominum Regem Carolum primum & prædictum Johannem Gibſon ut prefertur fact' per nomen literarum Patentium prædicto Johaani Gibſon Militi pro ſola factione & venditione Aluminis conceſſ. evacuaretur & cancellaretur, Et idem Querens ulterius dicit, quod poſtea ſcilicet quarto die Maii* 1648. *præd. perſonæ tunc ſeden' apud Weſtm. præd. ut Superior domus Parliamenti* Ordinaver. *quod Edwardus tunc Comes Mulgrave protinus intraret in & ſuper Aluminis opera Anglice* Allom works *domus & mineras infra prædictum Manerium de Mulgrave & caperet & reciperet proficua eorundem ad uſum ſuum propr. a præd.* 31 *die Marcii prout per eundem Ordinem plenius apparet, Pretextu quorum quidem ordinum prædictus Edwardus Comes Mulgrave poſtea ſcilicet decimo die Maii Anno Domini* 1648. *in tenementa & præmiſſa prædicta præfato Johanni Gibſon per prædictum nuper Regem Carolum primum ut prefertur conceſſa intravit & continuavit inde poſſeſſionat' uſque primum diem Aprilis Anno Domini* 1649. *ſupradicto.* And the Plaintiff likewiſe pleads a Clauſe in the Act of Oblivion *de Anno* 12. *Regis Caroli Secundi nunc Cap.* 11. whereby 'tis enacted, *That all Appeals, and all perſonal Actions, and Cauſes of ſuch Actions, Suits, Moleſtations and Proſecutions whatſoever, for or by Reaſon of any Act or Thing adviſed, counſelled, commanded, acted or done by Vertue or Colour of any Order or Ordinance of one or both Houſes of Parliament ſitting at* Weſtminſter, *or by any Act or Order made by any Perſons aſſuming the Name of a Parliament, and ſitting as a Parliament at* Weſtminſter *after the Death of the late King* Charles *the Firſt, or by the Authority of the ſaid* Keepers of the Liberty of England, *or by any Order of the late* Protector *and* Council, *or by or upon any common Writ, Proceſs or Warrant by them, or any of them, or by Authority derived from them, or any of them. And all Demands of Arrearages of Rents, and mean Profits of Lands, Tenements or Hereditaments heretofore incurred or grown due, which have been paid, received or diſpoſed, by Vertue or Colour of any the Authorities, or pretended Authorities*

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rities aforeſaid, other than ſuch Arrearages or mean Profits as are or ſhall be otherwiſe diſpoſed by any Act or Acts of this preſent Seſſion of Parliament, be from henceforth diſcharged. And the Plaintiff alſo pleads, That the ſaid Act and every Clauſe thereof by the *Stat.* 13 *Car.* 2. *cap.* 7. was confirmed and enacted and declared to have the full Force and Strength of an Act of Parliament, *ratione quorum Ordinum & Actuum prædictorum in forma præd. fact. edit. & proviſ. dictus redditus Octingent' & Viginti librarum pro dimidio unius* [200] *anni finit. ad dictum feſtum Annunciationis beatæ Mariæ Virginis Anno Domini* 1649. *in Cognitione prædicta mentionat' exonerat' exiſtit.* Then the Plaintiff avers, That the Indenture from the King mentioned in the Defendant's Cognizance and the Letters Patent mentioned in the Order of the Lords in 1648. are one and the ſame, and that the ſaid Rent mentioned in the Cognizance is not excepted by the ſaid Act of Oblivion, nor diſpoſed by any other Act of Parliament, *Et hoc parat' eſt verificare unde petit judicium & dampna ſua occaſione captionis & injuſtæ detentionis Aluminis prædicti ſibi adjudicari, &c.* On which Bar to the Cognizance, the Defendant demurs in Law. And it was argued by *Jones* and *Saunders*, That the Rent in Queſtion, which was Arrear, was not diſpoſed by the ſaid Orders of the Lords, which the Plaintiff hath pleaded, for there is no mention thereof in either of them; nor doth it appear that the Rent was intended to be diſpoſed by any Way, and therefore they conceived that this Rent in Queſtion was not diſpoſed by the ſaid Act of Oblivion, for which Reaſon they pray'd Judgment for the Avowant. And it was argued on the other Side by *Weſton* and *Levinz* for the Plaintiff, That this Rent was diſcharged by the Act of Oblivion; for they alledged, That by the laſt Order of the Lords *de* 4 *die Maii* 1648. the Rent is diſpoſed, becauſe they order that the Earl of *Mulgrave* ſhould enter into the Lands out of which the Rent was granted, and ſhould take the Profits thereof to his own Uſe, which was contrary and directly oppoſite to the Grant; for the ſaid Sir *John Gibſon* was not to pay the Rent when he could not have the Profits, but all the Profits by the ſaid Order were given to the ſaid Earl of *Mulgrave*, and conſequently the Rent was diſpoſed to him, which was nothing but Parcel of the Profits; and ſo the Rent was diſpoſed by that Order, and conſequently diſcharged by the Act of Oblivion: 2. They argued, That by the firſt Order of 31 *March* 1648. the Rent was diſpoſed, becauſe that Order made void the Indenture of Demiſe from the King; then if the ſaid Indenture is made void, that Rent ought conſequently to ceaſe, for the Eſtate out of which it is granted and iſſuing is overthrown by the ſaid Ordinance, *Et ceſſante ſtatu primitivo, Ceſſat & derivativus*; and it appears that this Rent of 1640 *l.* was reſerved by the King, and that the Deed of Grant thereof by the ſaid Sir *John Gibſon*, was but for the better *ſecuring* thereof to the Grantees; and therefore it was urged, That when the Order had condemned the Indenture from the King, which reſerved this Rent, it had diſpoſed thereof, *ſcil'* that it ſhould not be paid for the future, but that the Earl of *Mulgrave* ſhould take the Profits of the Land to his own Uſe diſcharged of the ſaid Rent, *Et quacunque via* the Rent was diſpoſed, *per* [201] *fas aut nefas*, if it was diſpoſed *omnino*, it was now diſcharged by the Act of Oblivion; wherefore they prayed Judgment for the Plaintiff: But the Court on the ſecond Argument gave Judgment for the Defendant who made the Cognizance, and gave their Reaſon for it, That the Orders pleaded by the Plaintiff had not made any Diſpoſal of the Rent; for the firſt Order is, That the Indenture from the King ſhould be void, which cannot be by a bare Order; but if the Indenture might be made void, the Eſtate granted thereby might continue; but the Order don't intend that ſhall be void *ipſo Facto*, but that it ſhould be made void by cancelling thereof; and then till the Indenture is actually cancelled the Eſtate continues; and there was no Mention of the Rent *omnino* in the Order; and therefore *non conſtat*, whether they intended to diſcharge the Rent or not (be the Order of any Force whatever) for the Rent in Queſtion is meerly founded on the Indenture from Sir *John Gibſon*, and not on the Indenture from the King; and in Point of Law it is another Rent

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than the Rent of 1640 *l.* reſerved by the King on his Indenture, altho' the Intention appears that there ſhall be but one Rent of 1640 *l.* paid. And as to the Order of the 4th of *May*, they ſaid that nothing appeared, but that the ſaid Earl of *Mulgrave* ſhould enter and enjoy the Lands, but notwithſtanding ſubject to the Rent-Charge in Queſtion; for nothing appears to the contrary: For if they intended to diſpoſe it, they would have mentioned the Rent in expreſs Words to be diſcharged; which not being done, the Court ſaid, the Rent was not diiſpoſed by any of the ſaid Orders, and ſo not diſcharged within the Act of Oblivion: But they ſaid, That perhaps Sir *John Gibſon* might have Remedy in Equity, but he could not help himſelf at Law. And the Avowant had Judgment given for him in this Term, which was the firſt Term the Caſe was argued, becauſe the Court took it to be a clear Caſe. *Nota*, No Exception was taken to the Defendant's Cognizance, that he had made Cognizance for the taking of *Allom* for 100 *l.* Parcel of 820 *l.* for the ſaid Rent of half a Year, and not for the whole; but *Weſton* told me he thought the Cognizance good *in ea parte*, and therefore he took no Exception to it.

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Term. Sancti Hill.

Annis Regni Regis Car. II. 20 & 21.

[206] [206] Salmon *againſt* Smith.

1 Sid. 405. Raym. 175. 1 Lev. 263. 2 Keb. 467, 470.

DEBT for Rent. The Plaintiff declares, That the 1 *Febr. Anno Domini* 1663 he demiſed to the Defendant *tres Cameras & unum Cellarium* being Parcel of the Plaintiff's Manſion-houſe *in Parochia Sancti Sepulchri London habend' a Feſto Natal' Domini tunc ultimo præterito uſque finem & Terminum unius anni integri extunc prox' ſequen' plenarie complend. & finiend' & ſic de anno in annum quamdiu ambabus partibus prædictis placeret reddend. annuatim* 9 *l.* at the four Feaſts, *viz.* The *Annunciation of our Lady, Midſummer, Michaelmas* and *Chriſtmas* by equal Portions; by Virtue of which Demiſe the Defendant entered and was poſſeſſed, *& Tenementa illa tenuit & occupavit a prædicto Feſto Natalis Domini per duos annos integros & tria quarteria unius anni tunc prox' ſequen' ac* 9 *l. de redditu prædicto pro uno anno integro* ended at *Mich.* 1666. were arrear and unpaid to the Plaintiff, for which he brings his Action. The Defendant as to the 4 *l.* 10 *s.* being the firſt half Year's Rent ended at *Lady-day* 1666. pleads *Nil debet per patriam*; and as to 4 *l.* 10 *s.* the Remainder of the Rent demanded for the laſt half Year's Rent ended at *Mich.* 1666. aforeſaid, he pleads in Bar, That the Plaintiff demiſed to him *non ſolum prædict' tres Cameras & unum Cellarium verumetiam unam aliam*

Cameram vocat' a Dining-room, being another Parcel of the Plaintiff's Houſe aforeſaid, *Habend. præd. tres Cameras & unum Cellarium prout* the Plaintiff hath declared, *Ac habend'* the Chamber called the *Dining-room a prædicto Feſto Natalis Domini tunc ultimo præterito uſque finem & Terminum unius anni integrs tunc prox' ſequen' plenar. complend. & finiend', Et ſic de anno in annum quamdiu ambabus partibus placeret (tali tempore quo quidam Richardus Whitmore Ar.* ſhould be *reſiden. infra Civitat' London tantummodo excepto)* yielding the ſaid yearly Rent of 9 *l. quarteriatim* as the Plaintiff hath declared, by Force of which Demiſe the Defendant entered *tam in prædict. tres Cameras & un. Cellarium quam in præd. al' Cameram vocat.* the Dining-room, *Et fuit inde poſſeſſionatus:* And then the Defendant further ſaith, That the Plaintiff before the Feaſt of St. *John Baptiſt Anno Domini* 1666. aforeſaid, *ſcil'* 23 *Junii* in the ſame Year *in præd' Cameram vocat'* the Dining-room *ſuper poſſeſſionem ipſius* the Defendant *inde intravit, ac ipſum* the Defendant *a poſſeſſione ſua inde expulit & amovit, ac ipſum* the Defendant *ſemper abinde uſque ad* [207] *Craſtinum præd. Feſti Sancti Michaelis Anno ultimo ſupradicto a poſſeſſione ſua inde extratenuit:* And then the Defendant avers, That the ſaid *Whitmore* for the whole Time aforeſaid *fuit reſiden. extra Civitat. London præd. videlicet apud Slaughter in Com' Glouc' ac per idem tempus ſeu per aliquam partem inde non fuit reſiden. infra Civitatem London prædict'*; wherefore he prays Judgment, whether the Plaintiff ought to have his Action. The Plaintiff as to the Plea of *Nil debet* enters a *Nolle proſequi*, and as to the ſaid ſpecial Plea he demurs in Law: And it was argued for the Plaintiff, That the Defendant's Plea was ill, becauſe the Plaintiff in his Declaration hath declared on a Demiſe made by the Plaintiff to the Defendant *de tribus Cameris & uno Cellario* only, and the Defendant hath pleaded a Demiſe made of the ſaid three Chambers and Cellar, and of another Room, and ſo varies from the Demiſe alledged by the Plaintiff in his Declaration, and hath pleaded another Demiſe which differs from the Demiſe alledged by the Plaintiff in the Number of Rooms; wherefore the Defendant in his Plea ought to have traverſed the Demiſe alledged by the Plaintiff, *ſcil'* with an *Abſque hoc quod præd'* the Plaintiff had demiſed the three Rooms and a Cellar only, as he had alledged in his Declaration; and it was ſaid, That for want of ſuch Traverſe the Plea was ill; and to prove it the Caſe of an Award in *Woodland* and *Mantell*'s Caſe in *Plow. Com. fol.* 95. was cited: If the Defendant pleads an Award made of three Things, the Plaintiff can't reply that the Award was made of the ſaid three Things and another Thing, but he ought to reply that the Award was made of four Things, and traverſe the Award made of three Things *tantum:* And the Opinion in the Books of 32 *H.* 6. 3. *b.* & 35 *H.* 6. 38. was cited, where 'tis held, That the Demiſe alledged by the Plaintiff ought to be travers'd as aforeſaid; and *Leon.* 1. *Rep.* 43. *Kimpton* againſt *Bellamy*, where in Replevin, the Plaintiff in his Bar to the Avowry claimed Common for all his Cattle levant and couchant, *&c.* in ſix Acres of Land; and the Defendant in his Replication ſhewed, That the Plaintiff had Common in forty Acres of Land, and had purchaſed two Acres of the ſame Land, and ſo had extinguiſhed his Common; he ought to traverſe the Plaintiff's Common in ſix Acres *tantum*; and ſo is *Newman* and *Moore*'s Caſe, *Hob.* 80, 81. wherefore Judgment was pray'd for the Plaintiff. And for the Defendant it was argued, That the Plea was good, and that there need not be any Traverſe in the Plea, but that the Traverſe ought to come on the Plaintiff's Part in his Replication, *ſcil'* in ſuch Manner, *viz. Quod præd. Quer' dimiſit præd tres Cameras & unum Cellarium tantum* as he hath ſuppoſed, *Abſque hoc quod dimiſit prædictam al' Cameram vocat'* the Dining-room *modo & forma prout* the Defendant hath [208] alledged in his Plea; and as to the Caſe of the Award aforeſaid, 'twas ſaid, That an Award is a Judgment in its Nature, and therefore as entire as a Judgment, which can't be pleaded by Parcels, but ought to be pleaded entirely, becauſe an Award of three or four Things is only one and the ſame Award; and an Award of three Things is not by Intendment of Law one and the ſame Award which is made of four Things, *nec econtra*; but here a

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Demiſe

Demiſe may be pleaded of any Parcel without mentioning the whole, as if a Man demiſeth two Acres to me for a Term of Years, and I am ejected out of one Acre by a Stranger, now I ſhall have an *Ejectione firmæ*, and count that this one Acre was demiſed to me without making any Mention of the other Acre, which proves that a Demiſe is not ſo entire, but that it may be pleaded by Parcels. And the principal Caſe of *Woodland* and *Mantel*, *Plo. Com.* 95. was cited, where the better Opinion is, That if a Tenure is alledged by five manner of Services, and the other Party alledges the Tenure to be by ſix manner of Services, he ſhall not traverſe the Tenure by five Services *tantum*, but the firſt Party ſhall traverſe the Tenure by the ſixth manner of Service, which is only in Controverſy; and as to the ſaid Books of 32 *H.* 6. 3. *b.* & 35 *H.* 6. 38. there is no Judgment given, but ſome Opinions the one Way and ſome the other; and yet there was no Suſpenſion pleaded to make it material, to which the other Party ſhould anſwer; and 5 *Ed.* 4. 8. *a.* which is a later Book, ſaith, It may be pleaded without a Traverſe, as it is here; and the Traverſe of *Tantum* is not on the Matter, but a Traverſe of a Negative; for it is impoſſible for the Plaintiff to prove that he demiſed but three Chambers and a Cellar *tantum*; but the Defendant may prove that the Plaintiff demiſed more, and a Negative ſhall never be travers'd, as 7 *H.* 6. 43. Diſceit for ſuing in the Name of *B.* without his Conſent; the Defendant pleaded, That he ſued in the Name of *B.* by his Conſent, *Abſq; hoc*, that he ſued *ſine aſſenſu* of the ſaid *B.* there the Traverſe was held ill, becauſe it was a Traverſe of a Negative: But there it was held, That the Defendant ought to reſt on the Affirmative that *B* aſſented, and the Plaintiff ſhould traverſe it, and upon that Iſſue ſhould be joined; and the Caſe of *Dyer* 30. *a.* was cited; Detinue on a Contract, the Defendant ſaid, That it was on a Condition, which was not performed, he ſhall not traverſe that the Contract was ſingle; but the Plaintiff ſhall ſay that the Contract was ſingle and ſhall travetſe the Condition; and yet a ſingle Contract and a conditional Contract is not all one, but the Rule of Pleading is to traverſe the Surpluſage and not the *Tantum*; So *Dyer* 280. *b.* Sir *Anthony Cook*'s Caſe, Replevin, the Defendant made Cognizance as Bailiff to Sir *Anthony* for Damage Feaſant in his Freehold: [209] The Plaintiff ſaid he held the Land in Coparcenary with the ſaid Sir *Anthony* as Coheirs to Sir *Edward Bellknap*, and good without a Traverſe of the ſole Freehold of the ſaid Sir *Anthony*; as the better Opinion is there. And if the Iſſue ſhould be joined on the *Tantum*, it may happen in this Caſe as it did in the Caſe in *Dyer* 32. *b.* where in Debt, the Plaintiff declared that he demiſed to the Defendant twenty-ſix Acres yielding Rent; the Defendant pleaded that he demiſed to him the twenty-ſix Acres, and alſo four Acres more, *Abſque hoc* that he demiſed the twenty-ſix Acres *tantum*; And the Jury found that the Plaintiff demiſed twenty-one Acres only; there the Court doubted for whom to give Judgment; but it is there ſaid, That the Traverſe ought to come on the Plaintiff's Part, *ſcil' Abſque hoc quod dimiſit prædictas Acras* (being the Surpluſage) *prout, &c.* And then the Jury's Charge will be only on the Surpluſage, *ſcil'* whether the four Acres were demiſed or not. And this manner of Pleading to leave the Traverſe to come in on the Plaintiff's Side, can't be any Prejudice to him in the leaſt, but gives him an Advantage; and therefore Judgment was pray'd for the Defendant: But the Court and *Twyſden* Juſtice, *Precipice* held the Plea ill for want of the ſaid Traverſe of the *Tantum*; and he ſaid, That altho' the Defendant hath pleaded an Entry and Suſpenſion by the Plaintiff, yet the Plaintiff can't traverſe it, but ought to maintain his Leaſe, as it is alledged in his Declaration, otherwiſe it will be a Departure in him; and if he traverſes the Entry into the ſaid Room called the *Dining-room*, which is not ſuppoſed by the Plaintiff to be demiſed, then he falſifies his own Declaration, which he can't do: And after it had been argued, and a Rule *Niſi Cauſa* given, and Cauſe ſhewn for the Defendant at another Day; Judgment was given for the Plaintiff. But methinks the leaving the Matter at large in the Plea, and ſo the Traverſe to come on the

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Plaintiff's Side in the Replication, had been the more proper and ſubſtantial Manner of Pleading; but the Court was of another Opinion, as is aforeſaid. *Pawlet* of Counſel for the Plaintiff, and *Saunders* with the Defendant.

[210] Forth *and others againſt* Stanton *Widow.* [210]

Trin. 20 *Car.* II. *Regis Rot.* 484.

(30) *Aſſumpſit*, The Plaintiffs declare, That one *Robert Stanton*, the Defendant's late Husband, was indebted to *John Neve* and *Timothy Alſopp* in 100 *l.* for Ale which they ſold him; and being ſo indebted, the ſaid *Robert Stanton* died, after whoſe Death the Defendant took into her Hands Goods and Chattels belonging to the ſaid *Robert Stanton ad valenc. præd'* 100 *l.* and thoſe Goods and Chattels as Executor of the Will of the ſaid *Robert Stanton*, adminiſter'd. And that afterwards the Defendant paid the ſaid *Neve* and *Alſopp* 40 *l.* Part of the ſaid 100 *l.* *Cumque* the ſaid *Neve* and *Alſopp* had aſſigned and appointed the Plaintiffs to receive of the Defendant 60 *l.* Reſidue of the ſaid 100 *l.* to their own proper Uſe; whereof the Defendant had Notice given her; whereupon ſhe in Conſideration that the Plaintiffs at her ſpecial Inſtance and Requeſt would accept her to be their Debtor for the ſaid 60 *l.* aſſum'd and promis'd the Plaintiffs to pay them the ſaid 60 *l.* And the Plaintiffs aver, That they did accept the Defendant to be their Debtor; and they alſo declare on an *inſimul computaſſet* for 60 *l.* more; *prædicta tamen* the Defendant had not paid the ſeveral Sums to the Damage of the Plaintiffs, *&c.* The Defendant as to the *Inſimul computaſſet* pleads *Non Aſſumpſit* (and on the Iſſue tried a Verdict was found for the Defendant) And as to the ſpecial Promiſe aforeſaid, ſhe pleads in Bar, That the Plaintiffs did not ſhew her any Writing or Deed, whereby the ſaid *Neve* and *Alſopp* had aſſigned to them, or appointed them to receive the 60 *l.* to their own Uſe, *Et hoc paratus eſt verificare, &c.* whereupon the Plaintiffs demur in Law. And now after the Verdict for the Defendant, the Plaintiffs move the Matter in Law on the Defendant's ſpecial Plea, which was by all agreed to be ill: But the Defendant's Counſel inſiſted, That the Declaration was inſufficient, for here is no ſufficient Conſideration to ground the Promiſe; for the Defendant before the Promiſe was not indebted to the Plaintiffs, but to *Neve* and *Alſopp*, and they don't by their Aſſignment transfer any Property or Intereſt in the Debt, being a Choſe in Action, but only give the Plaintiffs Authority to receive it, if the Defendant will pay it; but if the Defendant will not pay it, the Plaintiffs can't [211] bring any Action againſt her, but *Neve* and *Alſopp* ought to ſue for it; tho' it is true, if the Defendant had paid the Plaintiffs the 60 *l.* ſhe ſhould be diſcharged againſt the ſaid *Neve* and *Alſopp*; but here the Defendant refuſed to pay it, for which Reaſon *Neve* and *Alſopp* ought to bring the Action againſt her, and not the Plaintiffs, who have no Intereſt in the Debt. And this Caſe is no more than if I promiſe a Stranger, to whom I owe nothing, That if he will accept me to be his Debtor for 60 *l.* I will pay it him; yet this is but a *Nudum pactum*, becauſe I was not his Debtor before; and my Promiſe to pay, if the other will receive it, is nothing but a meer voluntary Promiſe which doth not oblige me *omnino*: And if the Promiſe ſhould be good in this Caſe, the Defendant will be charged *de bonis propriis* where ſhe was only chargeable to *Neve* and *Alſopp de bonis Teſtatoris*; and yet here is not any the leaſt Conſideration that ſhe ſhould be ſo charged; and the whole Court was of that Opinion: And at the Prayer of the Plaintiff's Counſel, Judgment was given for the Defendant, *Quod querens nil capiat per Billam. Jones pro Quer. Saunders pro Defendente.*

1 Lev. 262. 2 Keb. 465.

Winch. 7. 1 Lev. 248. 1 Mod. 12. 1 Ven. 9. Sty. 249. 1 Lev. 262. 1 Jones 67. Dr. & St. l. 2. c. 24.

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[215] Doughty *againſt* Neale.

2 Keb. 471.

DEBT on Bond. The Defendant prays *Oyer* of the Condition, which recites, That in a Suit depending in Chancery between *Elizabeth, Alexander, Priſcilla, Mary* and *Charles Fraiſer* Children of *Eliz. Fraiſer* deceaſed, by the Defendant their Guardian and Adminiſtrator *durante Minoritate*, to the Uſe of the ſaid Infants Plaintiffs and the ſaid *Doughty* now Plaintiff, and others Defendants, it was decreed, That the ſaid *Doughty*, now Plaintiff, ſhould pay to the ſaid Infants, or to their Guardian for their Uſe, the Sum of 850 *l.* in Satisfaction of all their Right, Title and Intereſt to the ſaid Leaſe, to the Defendants in Chancery, *If therefore the Defendant ſhall procute Doctor* Alexander Fraiſer, *or the Plaintiffs* Elizabeth *and* Priſcilla Fraiſer *to perform the Decree*; *And that he and they ſhall at their ſeveral and reſpective Ages of one and twenty Years releaſe, the Right, Title, Eſtate, Intereſt and Claim, which he or they, or either of them, have, hath or may* [216] *pretend to have in and to the ſaid Leaſe of the ſaid Manor and Lands, and to all the Rents and Profits due for the ſame, and had and received, or not received by the ſaid now Plaintiff, then the Obligation ſhall be void, &c.* Whereupon the Defendant pleads, That the ſaid Sir *Alexander Fraiſer* and the ſaid Infants *Elizabeth* and *Priſcilla* never had or pretended to have any Right, Title, Eſtare or Claim to the ſaid Manor and Lands, which they might releaſe, *Et hoc, &c, Unde, &c.* On which Plea the Plaintiff demurs in Law: And Judgment was given for the Plaintiff by the whole Court, becauſe the Defendant ought at his Peril to have procured them to make a Releaſe *de facto*, altho' they had no Right, *&c Et eo potius*, becauſe it appears by the Condition that they had a Pretence in Eqoity, altho' they had no Right, Title or Intereſt in Law. *Saunders* of Counſel with the Defendant. *Winnington* with the Plaintiff.

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Wheatly *againſt* Lane.

Mich. 20 *Car.* II. *Regis Rot.* 740.

1 Sid. 397.
1 Lev. 231, 255.
2 Keb. 431, 443, 455.

DEBT in the *debet & detinet*. The Plaintiff declares, That he had recovered a Judgment in Debt in this Court againſt the Defendant as Executor; and that after the Judgment the Defendant had waſted the Goods of the Teſtator to the Value of the Debt recovered, *per quod actio accrevit* to the Plaintiff *ad exigend' & habend'* of the Defendant the ſaid Debt; *præd' tamen, &c.* And on this Declaration there was a Demurrer in Law, and the only Queſtion was, whether ſuch Action did lie on a bare Suggeſtion of a *Devaſtavit* or not; And it was argued by *Pemberton* of Counſel with the Defendant, That the Action is not maintainable, becauſe this Action is founded on a Tort, and at Common Law no Action of Debt lies for a Tort, but an Action of Treſpaſs, or on the Caſe only, and not Debt; and he ſaid, That an Action of Trover and Converſion of Goods or Money ſounds in the Right, and yet Debt don't lie for ſuch Goods or Money converted; and there is a *Maxim* in Law, That *Actio perſonalis moritur cum perſona*, and in this Caſe the *Devaſtavit* is a perſonal Tort in the Defendant, yet if he dies, this Action of Debt (admitting it is maintainable) may be brought againſt his Executor or Adminiſtrator, and ſo *in infinitum*, which will entirely ſubvert the Rule of Law; and if ſuch Action of Debt on a *Devaſtavit* be brought againſt two Executors who plead to Iſſue, and one is acquitted, and a Verdict found againſt the other Executor, How ſhall Judgment be given? Shall it be [217] given *quod querens nil capiat per breve ſive billam eo quod* one joint Defendant is acquitted, as in all Actions of Debt it ought? Or ſhould it be *quod querens recuperet* as in an Action of Treſpaſs againſt two, and one is acquitted, yet the Plaintiff ſhall have Judgment againſt the other? And theſe Abſurdities,

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dities and many other difficult Queſtions and Inconveniencies will ariſe if ſuch new Invention as this is ſhall be admitted; for by the ſame Reaſon, which the Plaintiff here hath brought his Action on a Judgment againſt the Executor himſelf, for that very Reaſon he may bring ſuch Action againſt the Executor on a Judgment obtained againſt the Teſtator, or on a Bond entered into by the Teſtator in his Life-time; and ſo on the firſt Proceſs compel the Executor to find ſufficient Bail, which perhaps he cannot do, or otherwiſe be impriſoned for a long Time on a bare Suggeſtion of a *Devaſtavit*, which may be altogether falſe: And this will diſcourage all Men from taking upon themſelves the Office of an Executor, if when they have duly adminiſtered, they ſhall notwithſtanding be troubled, moleſted and put to Expence by ſuch vexatious Proceſs and Impriſonment: And he then took an Exception to the Declaration, becauſe altho' it be ſuppoſed that the Defendant hath waſted the Goods of the Teſtator, yet it is not averred that the Defendant hath not Aſſets in his Hands; for if he hath waſted Goods to the Value of the Debt in Demand, yet if he hath other Aſſets in his Hands to the Value of the ſame Debt, he ought not to be charged in this Action; for when an Action of Debt is brought againſt an Executor, and he pleads *ne unques Executor* and it is found againſt him, yet the Judgment is *de bonis Teſtatoris* if he hath ſo much in his Hands, before he is charged *de bonis propriis*; and ſo here the Defendant ought to be charged *de bonis Teſtatoris*, if he hath ſo much in his Hands, altho' he hath waſted other Goods to the Value of the Debt; and therefore he thought the Declaration was ill for want of ſuch Averment that the Defendant hath not other Aſſets in his Hands: And as to the Objection which may be made, that here was no Prejudice to the Defendant in this Action; he anſwered, That it may be a great Prejudice to the Defendant if this Action ſhould be maintainable; for he put this Caſe, An Executor hath Aſſets to the Value of 40 *l.* and he pays 20 *l.* in Satisfaction of a Debt on a ſimple Contract, and afterwards a Creditor for 20 *l.* by Bond brings ſuch an Action as this is on a Suggeſtion, that the Executor hath waſted the Teſtator's Goods in Payment of the 20 *l.* on the ſimple Contract, and thereupon recovers and hath Execution; now had the Executor paid all his Aſſets, yet another who hath a Debt for 20 *l.* on a ſimple Contract, may alſo recover 20 *l.* more which is leſt in the Executor's Hands, becauſe the Creditor by Bond recover'd but the 20 *l.* which were before [218] paid to the firſt Creditor by ſimple Contract; and by ſuch Means the Executor will be twice charged without any reaſonable Cauſe, and yet he can't any Way help himſelf. And he likewiſe ſaid, That altho' it may be objected that the Defendant hath Aſſets in his Hands, yet if he hath paid Money in Satisfaction of a Debt of an inferior Nature of the Value of ſuch Aſſets, it is a *Devaſtavit*, altho' he always retains his Aſſets in his Hands; he denied it, and ſaid, That if the Executor pays Debts of an inferior Nature to the Value of the Aſſets; yet that will not change the Property of the Aſſets, but they remain as to a Creditor of a Debt of a ſuperior Nature in the ſame Plight as they were before, and may be ſeiſed in Execution *in Specie* at ſuch Creditor's Suit as the Goods of the Teſtator, notwithſtanding ſuch Payment of a Debt of an inferior Nature; and he ſhewed ſeveral Inconveniencies which would ariſe if this Action ſhould be maintainable, *viz.* Executors would be always held to Bail, this Action would ſurvive to the Executors or Adminiſtrators of the Defendant, and then it would be a great Doubt whether it ſhould be conſtrued as a Debt on a Judgment, or as a Debt on a *Devaſtavit*, which is a bare Matter of Fact, and ſo doubtful, in which Degree it ſhould be paid by the Executor or Adminiſtrator, *ſcilicet*, Whether as a Debt on a Judgment, or as a Debt on a ſimple Contract founded on the *Devaſtavit*; and he cited the Book of 11 *H.* 4. 50. or (a) 56. as an expreſs

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(a) *It is fol. 56. a. b. where Plaintiff, the* Devaſtavit. *Suggeſtion at* adjudicat'.

an Action of Debt was brought againſt Adminiſtrators on a Recovery formerly had againſt them by the Writ was in the debet & detinet, &c. *it was abated; but there was no Suggeſtion of a* Sed Vide 11 H. 6. 7, 16, 35. *Where the Plaintiff would have maintained his Writ by the like here; by Reaſon of which Suggeſtion ſome of the Juſtices were of Opinion that the Writ was good.* Sed non

Judgment

Judgment in Point, that this Action don't lie, and thereupon he pray'd Judgment for the Defendant, *Levinz* for the Plaintiff argued, That altho' this Action was founded on a Tort, yet it well lay, for an Action of Debt at Common Law was maintainable againſt an Executor of his own Wrong, and yet the Tort is the very Foundation of the Action: (a) And in *Mich.* 43 *E.* 3. *placito primo* an Action of Debt lies at Common Law againſt a Gaoler for ſuffering one to eſcape out of Execution, which is meerly a Tort, and ſo he ſaid the Action might well lie, notwithſtanding that Objection; but whether the Action would ſurvive or not, was not now the Queſtion; for *non ſequitur* that it will ſurvive againſt the Executors and Adminiſtrators, becauſe it is maintainable againſt himſelf; for he ſaid, That an Action of Debt is maintainable againſt a Gaoler for an Eſcape out of Execution, and yet don't lie againſt his Executors or Adminiſtrators; *Vide* for that *Dyer* 271, 322. *Cro. Car.* 539. 41 *Aſſ. pl.* 15. And as to the Objection of the Want of an Averment that the Defendant had more Aſſets, he ſaid, That if the Defendant had more Aſſets, yet the Plaintiff hath his Election to bring this Action on the *Devaſtavit*, or to proceed againſt him for the other Aſſets at his Pleaſure; but he ſaid, That in this Caſe the Negative that the Defendant hath not more [219] Aſſets, need not be averred, becauſe it ſhall not be intended; but if the Truth was ſo, the Defendant might have pleaded it, and ſo drawn the Matter into Queſtion if he would, but he hath now paſſed over ſuch Advantage by his Demurrer. (b) And as to the Inconveniency which hath been objected that Executors would be in all Caſes held to Bail, he ſaid 'twas but reaſonable it ſhould be ſo; but that was at the Diſcretion of the Court, whether they ſhould be held to Bail or not, who are preſumed to be indifferent, and to adminiſter Juſtice impartially, and it is no more Miſchief than in all other Caſes. And as to the Pleading, he ſaid the Defendant might plead the General Iſſue of *Nil debet*, and give all Matters in Evidence for his Diſcharge, as he might on a Trial of a *Devaſtavit* on a *Scire facias*, and ſo no Prejudice to him; and he cited Judgments in this Point, *Mich.* 1655. *Rot.* 711. *in B. R.* or *in Communi Banco* (c) *Cory* againſt *Thinne*, where the like Action as this is was brought, and the Plaintiff recovered by Judgment; and *Paſchæ* 15 *Car. Secundi Regis Rot.* 546. *in B. R. Harwell* againſt *Ellis*, the ſame Caſe and Judgment: And he likewiſe cited a Roll in *Mich.* 12 *H.* 8. *Rot.* 40. to the ſame Effect: And the Book of 11 *H.* 6. *fol.* 7, 8, 16, 35, 36. was cited on both Sides, and much was ſaid thereto by both Parties: But the Court on the two former Caſes of *Cory* againſt *Thinne*, and *Harwell* againſt *Ellis*, which *Twyſden*, Juſtice, ſaid he remembred, delivered their Opinion for the Plaintiff, (d) That the Action was well brought, and gave Judgment accordingly for the Plaintiff. *Note*, It was argued twice and much debated, and is (as I believe) now ſettled; but the Conveniencies or Inconveniencies which will enſue are not yet known, *&c.*

(a) Ante 37. con'.

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(b) Ven. 355. 1 Sid. 63, 368. 3 Bulſt. 317.

(c) 2 Sid. 102. 1 Lev. 147.

(d) Salk. 314. p. 22. Note, *This Action don't lie on a Bond ſuggeſting ſuch a* Devaſtavit. 1 Vent. 321. 2 Lev. 209.

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Termino Paſchæ.

Anno Regni Regis Car. II. 21.

[226] Stennel *againſt* Hogg. [226]

TRespaſs, The Plaintiff declares, That the Defendant 10 *Decembris Anno Regni Regis nunc* 18. 60 *Oves* of the Plaintiffs *apud Draighton Parſloe in Com' Berks fugavit & chaſiavit per quod multipliciter deteriorat' fuerunt, Et alia Enormia, &c.* The Defendant juſtifies the chaſing in a Place called *Churchleys* in *Draighton Parſloe præd* which was the Freehold of one *John Theed.* The Plaintiff replies and makes Title to Common, and ſays he himſelf was ſeiſed *de uno Meſſuagio & duabus virgatis terre cum pertin. in Stewkley* in the ſame County in his Demeſne as of Fee; and that the ſaid Plaintiff and all thoſe, *&c.* have Common in Paſture *in quodam Campo vocat'* Clackhill *continen'* 100 *Acres* of Meadow and Paſture in *Draighton Parſloe præd'* whereof the ſaid Piece of Land *vocat' Churchleys* is and from the Time whereof, *&c.* was Parcel, *in qualibet parte præd' Campi vocat'* Clackhill *(preterquam in una acra ejuſdem* whereof the Plaintiff was ſeiſed in Fee*) al' quam prædicta pecia terre vocat'* Churchleys *modo & forma ſequen', viz.* in a Place called *Upper Clack-cloſe pro duodecim magnis averiis, viz equis & equabus bobus vaccis & Juvencis & pro ſexaginta ovibus* on the Plaintiff's Tenements levant and couchant in every Year on the firſt Day of *Auguſt & abinde* to *Lady-day tunc prox' ſequen' tanquam ad tenementa præd' cum pertin' ſpectan' & pertin', Et in reſiduo præd' Campi vocat'* Clackhill (except the ſaid one Acre *cujus reſidui* the ſaid Piece of Land called *Churchleys* is and from the Time whereof, *&c.* was Parcel) in Manner and Form following, *viz. pro duodecim magnis averiis, viz. equis equabus bobus vaccis & bidentibus* levant and couchant on the Tenements *Quibuſlibet duobus annis inſimul concurrentibus quando Campus ille aliquo genere grani Seminaretur in quadam parcel' inde* being Paſture called the Sword-Ground *(que per averia Inhabitantium de Draighton Parſloe præd. in eiſdem annis a feſto Annunciationis beatæ Mariæ Virginis prox preceden' uſque primum diem Auguſti prox' ſequen' depaſci ſolet)* in and upon the ſaid firſt Day of *Auguſt & abinde uſque* Lady-day following; *& pro duodecim magnis averiis præd' & ſexaginta ovibus* on his Tenements levant and couchant *ab & poſt meſſionem defalcationem & aſportationem reſpectivorum herbe & bladorum in annis præd uſque 25 diem Marcii tunc prox ſequen. in & per totum reſiduum Campi præd'. ac in quolibet tertio anno quando Campus præd' voc'* Clackhill *jacet friſcus & ad warrect' pro præd duodecim magnis averiis & ſexaginta ovibus per totum annum ſcilicet in* [227] *Feſto Annunciationis beatæ Virginis Mariæ uſque Lady day in & per totum reſiduum Campi præd. vocat'* Clackhill *except in ea parte terre arabilis que ſeminat' foret cum aliquo grano ad vel ante præd' Feſtum Annunciationis beatæ Mariæ, Et in ea parte ſic ſeminat. a præd. Feſto Annunciationis beatæ Mariæ Virginis uſque ad tempus ſeminationis præd'* [227]

as to the Plaintiff's Tenements *ſpectan' & pertinen'*. And the Plaintiff avers, That the ſaid Field called *Clackhill* 1. *Apr. Anno Regni Regis nunc* 18. *ſeminat. fuit cum tritico*; and that afterwards *ſcilicet* the firſt Day of *November eodem Anno* the Corn was cut and carried away, wherefore the Plaintiff afterwards *ſcilicet præd' tempore quo, &c.* put in his ſixty Sheep into the ſaid Piece of Land called *Churchleys ad herbam ibidem creſcen. depaſcend utendo communia ſua præd. in forma præd., Et hoc, &c. Unde, &c.* The Defendant rejoins and traverſes the Preſcription, whereupon Iſſue was joined and a Verdict found for the Plaintiff. And now this Term it was moved in Arreſt of Judgment, and ſeveral Exceptions were taken. 1. The Plaintiff preſcribes for Common *pro magnis averiis, viz. pro bidentibus*, whereas they are not *magna averia*, and ſo the Preſcription is not good. 2. That it is not ſhewn whether the Place where, *&c.* be Sword-Ground or Arable, as it ought; for the Plaintiff hath made the ſame Preſcription for Common in the Sword-Ground *ſcilicet pro magnis averiis*, and another in the Arable, *ſcil'* for the twelve great Beaſts and ſixty Sheep. 3. It is not averred that the Cattle of *Draighton Parſloe* depaſtur'd the Place where, *&c.* if it be Sword-Ground; for the Plaintiff by his Preſcription hath not entitled himſelf to Common in all the Sword-Ground, but in that only which was depaſtur'd by the Cattle of *Draighton Parſloe*, which ought to be aver'd; and for want thereof the Replication was ill, and the Plaintiff can't have Judgment. 4. It is not averr'd that the ſixty Sheep which were put into the Place where, *&c.* were levant and couchant on the Plaintiff's Tenements, and if they were not, then it was lawful for the Defendant to diſtrain them Damage feſant. *Sed non allocantur*; for as to the firſt Exception, it is not now material whether Sheep are *magna averia*, becauſe the Plaintiff juſtifies his putting his Sheep on another Preſcription, *ſcil'* by a Preſcription of Common for ſixty Sheep: (a) But *Kelynge*, Chief Juſtice, ſaid, Sheep were *magna averia* in reſpect of Conies. (b) And as to all the other Exceptions the Court ſaid, That after Verdict it ſhall not be intended but that the Plaintiff's Sheep were in that Part of *Churchleys*, wherein the Plaintiff hath Common; for otherwiſe the Defendant might have taken Advantage thereof by Demurrer or Rejoinder; but when he rejoins and traverſeth the Preſcription which is found againſt him, the want of an Averment, and all the other [228] Faults, are aided by the Statute of *Jeofails*; and ſo is *Prance* and *Tringer*'s Caſe, *Cro. Jac.* 44. wherefore after this Caſe had been twice moved, Judgment was given for the Plaintiff. *Note*, It ſeems to be an intricate Preſcription.

(a) Ro. Rep. 173. Cro. Jac. 580. pl. 12. V. Kelw. 197.
(b) 3 Cro. 458. Noy 145. Palm. 360. 1 Mod. 75.
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2 Sid. 87. 1 Vent. 164, 165. 3 Mod. 162.

Skinner *againſt* Gunton, Lyon *and* Leaſon.

Hill. 20 & 21 *Car.* II. *Reg. Rot.*——

ACtion for a Tort. The Plaintiff declares, That the Defendant *tertio die Marcii Anno Regni Domini Regis nunc viceſimo apud London, viz. In Parochia beatæ Mariæ de Arcubus in Warda de Cheape per Conſpirationem prius ibidem inter eos adinde habit' ad pregravand. & depauperand eund.* (the Plaintiff) *& cauſand. eundem* (the Plaintiff) *arreſtari ad ſectam præd. Willielmi Gunton* (one of the Defendants) *& deterrend. amicos & vicinos præfat.* (the Plaintiff) *a deveniend. mauucaptores pro eodem* (the Plaintiff) *ea intentione quod præd.* (the Plaintiff) *detent. foret in priſona pro defectu Manucaptorum adeoque de libertate ſua ſine aliqua juſta cauſa ſpoliaretur & deprivaretur in nomine prefati Willielmi* (*ſcilicet* the ſaid Defendant *Gunton*, one of the Defendants) *quandam querelam de placito tranſgreſſion. ſuper Caſum ad dampnum ipſius Willielmi* (*ſcilicet* the ſaid Defendant *Gunton*) 300 *l. verſus ipſum* (the Plaintiff) *ad ſectam præd. Willielmi* (the Defendant) *in Cur. de Record. tent. coram Dioniſio Gauden Mil' tunc un. Vic. Civit. London in Computatorio ſuo ſecundum conſuetudinem in eadem Civitate a tempore cujus contrarii memoria hominum non exiſtit uſitat. ſine aliqua juſta cauſa levaverunt & affirmaverunt, Et eundem* (the Plaintiff) *Virtute ejuſdem querele arreſtari & impriſonari*

priſonari & in priſona detineri per ſpacium viginti dierum & noctium cauſaver & procuraver. ubi revera præd. the Defendant *Gunton tempore levationis & affirmationis querele præd. verſus ipſum* (the Plaintiff) *non habuit aliquam juſtam cauſam actionis verſus prefat.* the Plaintiff, to the Damage of the Plaintiff 200 *l.* And thereupon he brought his Action, to which all the Defendants plead Not guilty; and the Jury find the Defendant *Gunton* Guilty, and aſſeſs Damages to 10 *l.* and Coſts: And the other two Defendants were acquitted in *Hillary* Term laſt: And on the Motion of *Saunders pro Defendente*, the Judgment was ſtay'd till this Term; And *Saunders* took three Exceptions in Arreſt of Judgment; 1. That there was *no Venue* laid where the Plaint was levied, or the Plaintiff taken by Virtue thereof. 2. That it was not alledged by the Plaintiff in his Declaration, That the Plaint levied in the Compter, was [229] determined either by Nonſuit, Diſcontinuance or Verdict againſt the Plaintiff there; for otherwiſe the Plaintiff hath commenced his Action too ſoon; as in an Action on the Caſe, or Conſpiracy, for falſly indicting one of Felony, the Plaintiff ought to ſhew that he was acquitted of the Indictment before he ſhall bring his Action, *F. N. B.* 114, 115. 3. That here is an Action of Conſpiracy, which charges the Defendants, That *per Conſpirationem inter eos habitam*, they cauſed a Plaint to be levied, and the now Plaintiff to be arreſted thereon, and all the Defendants but one (*ſcil' Gunton*) are acquitted. And ſo this Action fails; for one Defendant can't conſpire alone, as *F N. B.* 115. *E.* And altho' the Plaintiff might have had an Action on the Caſe againſt the three Defendants, or one Defendant alone; and if one had thereon been convicted, he ſhould have Judgment againſt him; yet in this Caſe the Plaintiff hath choſen an Action of Conſpiracy, which is found againſt him, becauſe the Defendant *Gunton* only could not levy a Plaint and cauſe the Plaintiff to be arreſted *per Conſpirationem* as this Action ſuppoſeth. And Conſpiracy lies for ſeveral other Matters, as falſe and malicious Indictment, where the Life of any Perſon is put in Jeopardy; for Diſceit in ſuing an Action againſt me, and procuring another to appear in my Name without my Privity, whereby I loſe my Land, *F. N. B.* 116. ſo for falſly and maliciouſly indicting one of a Treſpaſs, 3 *Aſſ. pl.* 13. And ſeveral Caſes are put there in *F. N. B.* where Conſpiracy lies for Treſpaſſes and Diſceits; wherefore he pray'd that the Judgment might be arreſted. *Sed non allocantur*; For as to the firſt Exception, the Court ſaid, That if there was no *Venue*, yet that is aided after Verdict by the new Statute of 16 & 17 *Car.* 2. *cap.* 11. the Caſe being tried in the proper County where the Action was laid; but here is a good *Venue*, for it is ſaid, That the Defendant *apud London in Parochia beatæ Mariæ de Arcubus in Warda de Cheape* cauſed the Plaint to be levied before the Sheriffs, and all the Matter which follows refers to the ſaid *Venue*, and ſo a good *Venue* was laid. And as to the ſecond Exception, the Court anſwered, That perhaps it might have been material on a Demurrer; but now the Verdict hath found the Defendant Guilty, *ſcil'* that he hath levied a Plaint, and cauſed the Plaintiff to be arreſted without any Cauſe; ſo the Court was not now in any Doubt, for it appears that the Defendant had not any Cauſe of Action to levy the ſaid Plaint; and the Court ſaid, That it might be now well intended that the Plaint was determined, but they did not regard whether it was determined or not; for if the Defendant would have had Advantage thereof, he ought to have ſhewed it, but he hath now paſſed this over by his Plea of Not guilty, and a Verdict is found againſt him. And as to the third Exception the Court [230] ſaid, That it was an Action on the Caſe, and therefore the Plaintiff ſhould have Judgment againſt the Defendant againſt whom the Verdict is found, altho' the other two Defendants are acquitted; and the Subſtance of the Action was the undue arreſting the Plaintiff, and not the Conſpiracy: Wherefore the Plaintiff had his Judgment by Rule of Court *præter Morton* Juſtice, who was of Opinion that it was an Action of Conſpiracy, and that two of the Defendants being acquitted,

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1 Vent. 12, 18, 19, 234. Raym. 176. 2 Keb. 473, 476, 497. 1 Rol. Ab. 112 pl. 12. 1 Jones 94. 9 Co. 56. b. Hutt. 49.

Winch. 54. 1 Sid. 15. Cro. Jac. 130, 131. Palm. 315. Latch. 49.

the

the Plaintiff could not have Judgment againſt the third. *Nota*, It ſeems to me that the Plaintiff ought not to have had Judgment in this Caſe, becauſe it ſeems to be a formed Action of Conſpiracy by theſe Words, *viz. per Conſpirationem inter eos habitam*; and the Verdict hath falſified the Declaration; for the Verdict by acquitting all the Defendants but one, hath in Effect found that it was not by Conſpiracy, as the Plaintiff hath declared. *Vide F. N. B.* 116. *K. L.* That a Writ of Conſpiracy lies againſt one alone for indicting a Perſon of a Treſpaſs or other Falſity, altho' it don't lie againſt one for indicting of Felony; but that ſeems to me to be intended an Action on the Caſe without theſe Words *per Conſpirationem*; for one Man alone can't be ſaid to conſpire with himſelf.

Style 57. Bro. Conſp. 13.

[237] [237] Thursby *and others againſt* Plant.

1 Sid. 401. 1 Lev 259. 2 Keb. 439, 448, 468, 492.

COvenant for Non payment of Rent brought in *London*; The Plaintiffs declare, That *Theophilus* Earl of *Lincoln* was ſeiſed of the Manor of *Fowingham* in the County of *Lincoln* in his Demeſne as of Freehold for his Life, and ſo ſeiſed 12 *Junii Anno Regni Regis nunc decimo quarto*, by Indenture made at *London in Parochia Sancti Dunſtani in occidente in Warda de Farringdon extra* demiſed to the Defendant ſeveral Meſſuages and Lands, Parcel of the ſaid Manor, *Habend'* from *Lady-day tunc ultimo preterito* for twenty-one Years, *Reddend'* the yearly Rent of 570 *l.* quarterly at four Feaſts, *&c.* And that the Defendant by the ſame Indenture covenanted with the ſaid Earl and his Aſſigns to pay the ſame Rent as it became payable: By Force of which Demiſe the Defendant entered and was poſſeſſed, and the ſaid Earl being ſeiſed of the Reverſion for his Life as aforeſaid, afterwards *ſcilicet* 15 *Novemb. Anno Regni Regis nunc decimo ſeptimo* by Indenture made at *London*, *&c.* granted the Reverſion to the Plaintiffs for the Life of the ſaid Earl; to which [238] Grant [238] the Defendant at *London*, *&c.* attorn'd, by Force of which Grant and Attornment the Plaintiffs were ſeiſed of the Reverſion: And then they aſſign for Breach of Covenant, That the Defendant had not paid them 285 *l.* of the Rent aforeſaid, being due for half a Year ending at *Michaelmas Anno Regni Regis nunc decimo octavo*; and ſo had broke his Covenant to the Damage of the Plaintiffs 600 *l.* and thereupon they brought their Action. To which the Defendants pleaded in Bar, That after the Demiſe, and before the Grant of the Reverſion to the Plaintiffs, *ſcilicet* 28 *Marcii Anno Regni Regis nunc decimo quinto* the Defendant at *London*, *&c.* ſurrender'd his Term to the ſaid Earl, which he accepted, *Et hoc*, *&c.* The Plaintiffs reply, That the Defendant did not ſurrender *modo & forma*, *&c.* and thereupon Iſſue was joined: And at the *Niſi prius* at *London* in laſt *Michaelmas* Term, it was found for the Plaintiffs, and Damages aſſeſſed: And it was moved in Arreſt of Judgment, and the Judgment was ſtay'd till this Term, and it was ſeveral Times debated in *Hillary* Term, and in this preſent Term; And the Exception which the Defendant's Counſel took to the Declaration was, That this Action of Covenant brought by the Plaintiffs being Aſſignees of the Reverſion is a local Action and miſlaid, * for it ought to be laid in the County of *Lincoln* where the Lands lie, and not in *London* where the Indenture of Demiſe and the Grant of the Reverſion and the Attornment are ſuppoſed to be made; † as an Action of Debt for Rent, brought by the Aſſignee of the Reverſion, ought to be brought in the County where the Land lies, and not elſewhere; for ſuch Action is maintainable by Reaſon of the Privity of Eſtate only, no Privity of Contract being between the Aſſignee and the Leſſee, and therefore ſuch Action is local, as *Hob. Rep.* 37. *Pine* againſt the Counteſs of *Leic'*; ſo *Cro.* 4 *Car.* 143. *Long* againſt *Nethercott*, And *Cro.* 5 *Car.* 183. Sir *Stephen Board* againſt *Cadmore*; And that was not denied on the other Side, for it was agreed if it had been an Action of Debt for the Rent, which was an Action at Common Law (for the Common Law hath annexed the Rent to the Reverſion, and the Aſſignee ſhall

* Poſtea 247.

† 1 Sid 266, 339, 402. Cro El. 636. Dyer 40. a. b. 213. a.

have an Action of Debt for it at Common Law, by Reaſon of the Privity of Eſtate only) it had been local, becauſe the Privity of Contract which makes it Tranſitory fails in the Aſſignee, and he ſhall maintain an Action of Debt for the Rent on the Privity of Eſtate only, which is always local; but this Action of Covenant by an Aſſignee don't lie at Common Law, as appears by the Preamble of the Statute of 32 *H.* 8. *cap.* 34. but is given by the ſame Statute, whereby 'tis enacted, *That as well all and every Perſon and Perſons and Bodies Politick, their Heirs, Succeſſors and Aſſigns, which have or ſhall have any Gift or Grant of the King by his Letters Patents of any Lordſhips, Manors,* [239] *Lands, Tenements, Rents, Parſonages, Tythes, Portions, or other Hereditaments, or* [239] *of any Reverſion of the ſame which did belong or appertain to any of the ſaid Monaſteries and other Religious and Eccleſiaſtical Houſes diſſolved, ſuppreſſed, relinquiſhed, forfeited, or by any other Means come to the King's Hands ſince the fourth Day of* February, *in the 27th Year of his Reign, or which at any Time before did belong or appertain to any other Perſon or Perſons, and after came to the Hands of our ſaid Sovereign Lord; As alſo all other Perſons being Grantees or Aſſignees to or by our ſaid Soveresgn Lord the King, or to or by any other Perſon or Perſons than the King's Highneſs, and the Heirs, Executors, Succeſſors and Aſſigns of every of them, ſhall and may have and enjoy all and every ſuch like Advantages againſt the Leſſees, their Executors, Adminiſtrators and Aſſigns, by Entry for Non-payment of the Rent, or for doing of Waſte, or other Forfeiture; And alſo ſhall and may have and enjoy all and every ſuch like and the ſame Advantage, Benefit and Remedy by Action only, for not performing of other Conditions, Covenants and Agreements, contained and expreſſed in the Indentures of their ſaid Leaſes, Demiſes or Grants againſt all and every the ſaid Leſſees, and Farmers, and Grantees, their Executors, Adminiſtrators and Aſſigns, as the ſaid Leſſors or Grantors themſelves, or their Heirs or Succeſſors ought, ſhould or might have had and enjoyed at any Time or Times in like Manner and Form as if the Reverſion of ſuch Lands, Tenements and Hereditaments had not come to the Hands of our ſaid Sovereign Lord the King, his Heirs and Succeſſors, ſhould or might have had and enjoyed in certain Caſes and by Vertue of the Act made at the firſt Seſſion of this preſent Parliament; If no ſuch Grant by Letters Patents had been made by his Highneſs.* And this Act of Parliament hath now transferred the Privity of Contract from the Leſſor to the Aſſignee of the Reverſion by the Words of the Act, which ſay, That the Aſſignee ſhall have *ſuch like and the ſame Advantage*, &c. *by Action only, for not performing the Covenants as the Leſſor*, &c (a) And ſo the Privity of Contract is transferred by this Act as in the like Caſe the Privity of Contract is tranſfer'd by the Statutes of Bankrupts by Aſſignment of the Commiſſioners of Bankrupts; wherefore the Action here is well brought in *London*, where the Contract was made, and where the Leſſor himſelf might and ought alſo to have brought his Action, if he had (a) *not* aſſigned over his Reverſion: Againſt which it was objected on the Defendant's Behalf, That an Action of Covenant lay at Common Law (b) for an Aſſignee of Land for a Thing to be done on the ſame Land, as appears in *Spencer*'s Caſe, *Co.* 5. 17. 18. And ſo it is ſaid in *Coggham* and *King*'s Caſe, *Cro.* [240] *Car.* 122. And this [240] Statute don't transfer all Covenants, but only thoſe which concern the Land demiſed, as to repair the Houſes, or to amend the Fences, and don't tranſfer any collateral Covenants, as to pay a Sum of Money in groſs, or other ſuch like; as appears, *Co. Litt.* 215. *a. & b.* and therefore the Intent of the Statute was not to transfer any Privity of Contract, but to knit and annex the Covenants touching or concerning the Land demiſed to the Reverſion; ſo that they might paſs as annex'd and incident to the Reverſion: For if the Intent of the Statute had been to transfer the Privity of Contract, then all Covenants, as well thoſe which are collateral, as thoſe which concern the Land demiſed would have paſs'd; the contrary whereof appears by all the Books: And the beſt Conſtruction of a Statute is to extend it as near to the Rules of Common Law as may be; but the Common Law annexeth the Action of Debt for Rent to the Reverſion, and the Aſſignee ſhall maintain it only on the Privity of Eſtate, and not on the Privity of Contract, and ſo the Statute may be now expounded, that the Action of Covenant is

Noy 42. Cro. Jac. 105. Lut. 456. 1 Sid. 327.

(a) *This Word* not *is wanting in the Original, but ſeems neceſſary to make the Clauſe ſenſible.*

(b) Cro Car. 137. 1 And. 82.

annex'd to the Reverſion, and the Aſſignee ſhall maintain ſuch an Action of Covenant on the Privity of Eſtate, and not on the Privity of Contract: And 'tis not like an Aſſignment by Commiſſioners of Bankrupts, for there nothing but a bare Choſe in Action is transferred, and no Eſtate or Reverſion to which it may be annex'd, and therefore the Privity of Contract ought of Neceſſity to be transferred; for otherwiſe nothing at all will be transfer'd: But if a Man ſeiſed in Fee makes a Leaſe for Years reſerving Rent, and afterwards becomes a Bankrupt, and the Commiſſioners aſſign over the Reverſion and Rent, there the Aſſignee ſhall have an Action of Debt on the Privity of Eſtate, and not on the Privity of Contract; wherefore 'twas pray'd, that the Judgment might be arreſted. But after Conſideration the Court reſolved, That the Action here was well brought in *London*, becauſe they held, that the Statute transferred the Privity of Contract, for an Action of Covenant is not like an Action of Debt for Rent reſerved; (c) for if the Leſſee aſſigns over his Term, and the Leſſor accepts the Aſſignee as his Tenant, now the Leſſor can't have an Action of Debt for Rent againſt the firſt Leſſee, by Reaſon of his own Acceptance, by which he hath extinguiſhed the Privity of Contract; as *Walker's* Caſe, *Co.* 3, 24. *a. b. Cro.* 11 *Jac.* 334. *Marſh* againſt *Brace*; (d) But yet in ſuch Caſe the Leſſor after his own Acceptance ſhall maintain an Action of Covenant, as it is adjudged in *Batchelor* and *Gage's* Caſe, *Cro.* 6 *Car.* 188. And the Court relied much on the Caſe of *Brett* and *Cumberland*, *Cro.* 16 *Jac.* 521, 522 where Queen *Elizabeth* made a Leaſe for Years yielding Rent, and the Leſſee covenanted to pay it; [241] And afterwards the Queen died, and the Reverſion deſcended to King *James*; and afterwards the Leſſee aſſigned over his Term, and the Aſſignee pay'd the Rent to the King; and afterwards the King granted the Reverſion by his Letters Patents, and the Patentee accepted the Rent of the Aſſignee; and afterwards the ſaid Patentee brought an Action of Covenant againſt the Executors of the firſt Leſſee, and adjudged that it was maintainable, which ought of Neceſſity to be by Reaſon of the Privity of Contract, transferred by Force of the ſaid Statute, for there was no Privity of Eſtate between them; for the firſt Leſſee had aſſigned his Term before the Grant of the Reverſion to the Patentee, which proves that the Privity of Contract is transferred by the Statute; wherefore it was adjudg'd for the Plaintiff in this Term: Upon which the Defendant brought a Writ of Error *in Camera Scaccarii*; and in *Hill.* 22 *&* 23. *Regis* the Caſe was opened, and the Juſtices and Barons *prima facie* were of different Opinions; for which Reaſon the Counteſs of *Lincoln*, who was concern'd in the ſaid Rent, perceiving it, compounded with the ſaid *Plant*, the Defendant, and allowed him 50 *l.* out of the Money recovered and other Rent due, and he paid the Reſidue; and ſo it was not determined in the Exchequer Chamber. *Jones*, *Winnington* and *Kelynge* of Counſel with the Plaintiffs in the King's Bench, and *Saunders* with the Defendant,

(c) Cro. El. 556. p. 17. 715. p 29. 2 And. 133. Mo. 602. p. 829. 1 Sid. 402. Bul. 152, 153.

(d) 2 Rol. R. 63, 64. Cro. Jac. 309. p. 8. Co. Car. 550.

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1 Jones 122. 1 Browl. 20. Style 300. 2 Mod. 139.

[246] Craft *againſt* Boite.

[246]

Raym. 180. 1 Vent. 22. 2 Keb. 496. 1 Mod. 199.

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ACtion on the Caſe for ſcandalous Words, the Plaintiff declares, That the Defendant *apud London, &c.* falſly and maliciouſly ſpoke theſe Words of him, *videlicet*, *Look, there is a thieviſh young Rogue, (innuendo & digito) monſtrando* the Plaintiff, *Didſt ever ſee ſuch a thieviſh young Rogue? He hath ſtollen two hundred Pounds worth of* [247] *Plate out of* Wadham-College, *in the Univerſity of* Oxford, *innuendo, &c.* to the Damage of the Plaintiff 200 *l.* and thereupon he brings his Action. The Defendant juſtifies the Words, becauſe he ſays, the Plaintiff *apud Oxon' in Com' Oxon'* ſtole certain Plate out of the ſaid *Wadham-College*, wherefore he ſpoke the Words *apud London præd. prout ei bene licuit.* The Plaintiff replies, *De Injuria ſua propria abſque tali Cauſa*; and thereupon Iſſue was joined, which was tried at the *Niſi prius* in *London*, and a Verdict for the Plaintiff, and 50 *l.* Damages:

And now it was moved by *Saunders* in Arreſt of Judgment, That here was a Miſtrial, for the ſpeaking the Words at *London* was confeſs'd by the Defendant in his Juſtification; And the Point in Iſſue is, Whether the Plaintiff committed the Felony alledged by the Defendant in his Juſtification or not, which was triable and to be tried in the County of *Oxford*. *Cro. El.* 261. *Forde* againſt *Brooke*. An Action for Slander of Perjury at *Dale* in *Eſſex*; The Defendant juſtified that the Plaintiff was perjured at *Weſtminſter*, and the Venue was awarded to be from *Weſtm' in Midd'*; and (a) ſo is the Caſe of *Bowyer* and *Jenkins*, *Mo. Rep.* 410. And it is clear that it was ſo at Common Law: (b) But the Queſtion was on the new Statute of 16 & 17 *Car.* 2. *cap.* 8. whereby it is enacted, That no Judgment ſhall be arreſted or reverſed *for that there was no right* Venue, *ſo as the Cauſe were tried by a Jury of the proper County or Place where the Action was laid.* And *Saunders* urged, That the Statute ought to be interpreted that the Cauſe ought to be tried in the proper County where the Iſſue *ariſes*, and here the Iſſue *ariſes* in *Oxfordſhire*: For if a Conſtruction ſhall be made literally, the Statute will ouſt all Trials by the proper County where a local Juſtification is pleaded, which ariſes out of the County where the Action is laid; as of an Action of Falſe Impriſonment in *London*; the Defendant juſtifies in *Oxford* as Sheriff of *Oxfordſhire*, and traverſes *London*; now if Iſſue is joined on the Cauſe of Impriſonment, this ought to be tried in *Oxfordſhire*; but by this Conſtruction it may be tried in *London*: So in Debt on Bond brought in *London*, if the Condition is to erect a Houſe at *Everwyck*, and Iſſue is joined, whether it was erected or not, it may be tried at *London* by this Conſtruction; and ſo it will be now impoſſible to remove any *Venue* by pleading out of the County where the Action is laid; and the Statute intended only to order a wrong *Venue*; as if the Iſſue ariſes at *Dale* in the County of *Oxford*, and the *Venue* is from *Sale* in the ſame County; here is a right County but a wrong *Venue*: But in the Caſe at Bar there is a wrong County, which (as he conceived) was not aided, nor intended to be aided, by the ſaid Statute: And *Twyſden* Juſtice, was entirely of that Opinion; but *Kelynge* Chief Juſtice, *Rainsford* and *Morton* Juſtices, were [248] of a contrary Opinion, and ſaid, That the Words of the Statute were full, and here the Iſſue was tried by a Jury of the proper County where the Action was laid, which was within the expreſs Words of the Statute, and, as they conceived, within the Intent of the ſame Statute; wherefore they gave Judgment for the Plaintiff on the firſt Motion againſt the Opinion of *Twyſden* Juſtice, and ſeveral others, as I was afterwards informed.

(a) Yelv. 49. Perk. 32. p. 152. Cro. Jac. 43, 127. Cro. El. 468, 870. Goul. 188. Hob. 76. (b) 1 Lev. 121. 3 Keb. 350, 372, 509. 1 Vent. 263.

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[249] Faulkner's *Caſe* per Indictamentum de Termino Paſchæ.

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Faulkner was indicted at the Seſſions of Peace held *infra Villam & Burgum de Southwark in Com' Surr' pro Villa & Burgo præd*, before Sir *William Turner* Knight, *Majore Civitat. London*, and ſeveral Aldermen of the ſame City, Juſtices of Peace within the ſaid Borough of *Southwark*, *per ſacramentum proborum & legalium hominum Ville & Burgi præd. jurat' & onerat' ad inquirend' pro dicto Domino Rege & Corpore Civitat. præd.* that he for a certain Time mentioned in the Indictment had taken upon himſelf to keep, and had kept a common Tippling-houſe within the ſaid Borough, without the Licence, Admiſſion, or Allowance of two Juſtices of Peace, and during the ſame Time had ſold Ale privately to ſeveral of the King's Subjects, unknown to the Jury. And the Indictment concludes in this manner. *Iſſ. In Contemptum dicti Domini Regis nunc legumque ſuarum ac contra pacem dicti Domini Regis nunc Coronam & dignitat' ſuas, &c.* And this Indictment being brought into the King's Bench this Term, it was moved by *Saunders* to be quaſh'd for two Exceptions; 1. Becauſe it appears that the Jury were not ſworn or charg'd to preſent any Offence within the Borough of *Southwark*, but were ſworn and charged to preſent Offences within the City of *London*; for the Words

2 Keb. 506.

are,

are, *ad inquirend' pro dicto Domino Rege & Corpore Civitat. præd.* and there is no City nam'd before, but the City of *London*, and ſo the Jury's Preſent-
(b) 1 Sid. 175. ment of a Fact in the Borough of *Southwark eſt præter ſacramentum*; (b) for they were not ſworn or charged thereto; but the Court would not quaſh the Indictment for that Exception, becauſe it is but a Miſtake of the Clerk in certifying the Caption, which may be amended in the ſame Term that it is certified into this Court, tho' it can't be amended in any other Term; wherefore *Twyſden* Juſtice, told *Saunders* he had moved that Exception *too ſoon*. Then he moved the ſecond Exception, That the Indictment concluded to the Common Law, as if it had been an Offence by the Common Law,
(a) Hutt. 99. and did not conclude *contra formam Statuti*, as it ought; (a) for the keeping a
2 Rol. R. 398. Tippling houſe and ſelling Ale without Licence, *&c.* was no Offence at the
[250] Law; but it made an [250] Offence by the Statutes of 5 & 6 *E.* 6. *cap.* 25. and 3 *Car.* 1. *cap.* 3. And therefore the Indictment being founded on a Statute-Law, only ought to have concluded *contra formam Statuti*, and becauſe it did not ſo conclude, 'twas ill: And the Court were of that Opinion, after *Kelynge* Chief Juſtice, and *Twyſden* Juſtice, had communed together in Court. And for this Exception the Judgment was quaſh'd.

[260] Took *againſt* Glaſcock.

DEBT for Rent. The Caſe was ſuch in Effect, *Crafford Gibbens* was ſeiſed in Tail of the Reverſion of the Manor of *Bawdes cum pertin' in Eſſex*, expectant on the Death of *John Gibbens*, who was Tenant thereof by the Curteſy of *England*; and ſo ſeiſed, the ſaid *Crafford* by Indenture demiſed a Meſſuage, a Mill and four Acres of Land, Parcel of the ſaid Manor, to one *John Letton* for twenty-one Years, to commence on the Death of the ſaid *John Gibbens*, Tenant by the Curteſy, yielding the yearly Rent of 10 *l.* which Term and the Intereſt therein the ſaid *Letton* aſſigned over to the Defendant; afterwards the ſaid *Crafford* by Bargain and Sale indented and enrolled, in Conſideration of Money, bargain'd and ſold the Reverſion of the ſaid Tenements ſo demiſed to *Gilbert Kinder*, *Habend'* to him and his Heirs; afterwards *Kinder* made his Will in Writing, and thereby deviſed the ſaid Reverſion ſo bargain'd and ſold to him, to *Margaret Took* the Plaintiff and her Heirs, and died; and afterwards *Crafford Gibbens* levied a Fine with Proclamations to a Stranger of the entire Manor, whereof the Tenant by Curteſy was ſeiſed for his Life, and afterwards died; and afterwards the Tenant hy Curteſy likewiſe died; and the Defendant by Force of the ſaid Demiſe and Aſſignment entered, and the ſaid *Margaret Took*, the Plaintiff, ſuppoſing ſhe had the Reverſion, brought an Action of Debt againſt the Defendant for the Rent reſerved on the Leaſe: And on ſpecial Pleading, all this Matter was diſcloſed: And on ſeveral Arguments by the Serjeants, the Court gave Judgment for the Defendant, that the Rent did not belong to
(b) 3 Co. 84. b. the Plaintiff: And in this Caſe theſe two Points were reſolved; (a) 1. That
[261] by the [261] Bargain and Sale by *Crafford Gibbens*, who was but Tenant in Tail
10 Co. 96. a. 98. a. of the Reverſion, nothing paſs'd to *Kinder* the Bargainee, but an Eſtate de-
Cro. Car. 429. Cro. El. 896. ſcendible for the Life of the ſaid *Crafford*, according to *Co. Lit.* 329 *b. Sect.* 606. which can't be deviſed within the Statute of 32 *H.* 8. *cap.* 1. and 34 & 35 *H.* 8. *cap.* 5. which laſt Statute expounds, That Eſtates of Inheritance ſhall be an Eſtate of Fee-ſimple only; but here the Eſtate bargain'd and
(b) 2 Co. 55. replev. 6. 2 Cro. 689. ſold to the ſaid *Kinder*, ſhall deſcend to his Heir at Law notwithſtanding his Will. (b) 2. That altho' by the Fine of *Crafford Gibbens* after the Death of *Kinder* the Bargainee, the Eſtate-tail of *Crafford Gibbens* was barr'd and extinguiſh'd; yet that will not give any Advantage to the Plaintiff, being the Deviſee, to make the Will good by way of Relation, but only corroborates the Eſtate of the Heir of *Kinder*, to whom it was deſcended before the Fine levied, and makes it a baſe Fee-ſimple in the ſaid Heir, which was before but an Eſtate for Life deſcendible. And a Rule was accordingly given

this Term, and Judgment entered for the Defendant by the Opinion of *Vaughan* Chief Juſtice, *Tyrril*, *Archer* and *Wylde* Juſtices, *Tyrril prius heſitante*. *Saunders* was of Counſel with the Defendant in this Caſe. *V.* 24 *E.* 3. 48. *b.* *Margery Cally*'s Caſe, that of ſuch an Eſtate the Wife is dowable; and the Court there ſaid, That ſuch an Eſtate was a Fee: But the Reporter makes a *Quære* thereof. *V. Co.* 384. *b. Co.* 10. 96, 98. in *Seymour*'s Caſe, (a) that an Eſtate *pur auter vie* is not deviſeable. *Vide Cro. El* 304. 33 *E.* 3. *Deviſe* 21. *Dyer* 253.

(c) *The Law is altered in This Reſpect, for by* 29 Car. 2. c. 3. par. 12. *Eſtates* pur auter vie *are deviſable.*

[262] D E [262]

Term. Sanct. Trin.

Anno Regni Regis Car II. 21.

[263] Saunders's *Caſe* per Indictamentum de Termino Paſchæ. [263]

Saunders was indicted before two Juſtices of Peace for the County of *Surrey* for *having and keeping* a Hand-Gun and ſhooting therewith againſt the Form of the Statute of 33 *H.* 8. *cap.* 6. for which he was adjudged to pay 10 *l.* the one Moiety thereof to the King, and the other to the Party who brought him before the ſaid Juſtices; and he was committed in Execution *quouſque* he ſhould pay the ſaid 10 *l.* *Et Termino Paſchæ ult'* he brought a *Habeas Corpus* and a *Certiorari* to remove the Record of the Conviction into the King's Bench: And it was moved to be quaſh'd for ſeveral Exceptions: And now this Term it was quaſh'd for this Exception, *videlicet*, That the Conviction was ſaid to be *coram Thoma Brent & Georgio Brown Ar. duobus Juſtic' Domini Regis ad pacem in Com' præd' conſervand.* but this Word (*Aſſign'*) was omitted, for it ought to have been *conſervand' aſſignatis*; and ſo it don't appear whether the ſaid Juſtices were aſſigned to keep the Peace or not. *Note*, This Conviction was before two Juſtices of Peace, but the Statute gives Authority to one Juſtice alone, being the next Juſtice of the County where the Offence is committed, to commit the Offender for the Forfeiture; but here it don't appear whether either of the ſaid two Juſtices was the next Juſtice or not, which was another Exception intended to be moved; but the Conviction being quaſh'd for the Exception aforeſaid, this Exception was not moved. *Gee* and *Saunders* of Counſel with the ſaid *Saunders*.

2 Keb. 521, 537, 694. 1 Vent. 23, 39. 1 Sid. 419.

1 Rol. R 421. H. P. C. 75.

[267] [267] Osborne *againſt* Rogers, *Executor of* Weſton.

2 Keb. 525. *Aſſumpſit.* The Plaintiff declares, That he ſerved one *John Weather* for three Years next before the firſt Day of *March* 1647. and in that Service gain'd 60 l. *per Annum*; and he being ſo in Service, the ſaid Teſtator *Weſton*, in Conſideration that the Plaintiff at his Requeſt *deſerviret eidem Willielmo Weſton & operam & curam ſuam impenderet in & circa negotia ipſius Willielmi Aſſumpſit ſuper ſe* and promiſed the Plaintiff *quod ipſe Willielmus reciperet ipſum Robertum Osborne in ſervitium ipſius Willielmi & eſtimaret ipſum Robertum ut filium ipſius Willielmi proprium ac uberrime provideret pro eodem Roberto*; And the Plaintiff avers in Fact, That he giving Credit to the ſaid Promiſe on the twenty-firſt Day of *March* 1647. aforeſaid, came into the Service of the ſaid *Weſton* the *Teſtator*, and ſerv'd him *extunc uſque primum diem Novembris Anno Regis nunc decimo ſexto*, and during all the Time *curam & operam ſuas in & circa negotia ipſius Willielmi ſumma cum diligentia impendebat abſque aliquibus mercede ſeu ſallario ei a prefato Willielmo Weſton proinde dat'*. And moreover the Plaintiff avers, That the ſaid *Weſton* the *Teſtator* afterwards *ſcilicet nono die Decembr' Anno Regis nunc* 18. died intereſted and poſſeſſed of a real and perſonal Eſtate to the Value of 30000 *l.* and upwards, *Et nullos habuit liberos proprios*; And then the Plaintiff aſſigns the Breach, That the *Teſtator hucuſque non uberrime proviſit nec dedit ei aliquam compenſationem pro ſervitio ſuo prædicto preterquam ſummam viginti librarum que minus ſufficens fuit compenſatio pro ſervitio ſuo prædicto, licet* the Teſtator in his Life-time, and the Defendant [268] afterwards was thereto requeſted, to the Plaintiff's Damage 100 *l.* The Defendant pleads in Bar of the Action, That true it is that the ſaid Plaintiff on the ſaid twenty-firſt Day of *March Anno Domini* 1647. came into the ſaid *Teſtator*'s Service and continued in the ſaid Service *uſque ultimum diem Decembris Anno Domini* 1658. during which Time the ſaid *Teſtator uberrime provedebat* for the ſaid Plaintiff Meat and Drink, and paid him *annuatim* 8 *l.* for his Sallary: And the Defendant likewiſe ſays, That on the ſaid laſt Day of *December Anno Domini* 1658. *ſupradicto* the Plaintiff voluntarily left the ſaid *Teſtator*'s Service, *abſque hoc* that the Plaintiff ſerved the ſaid Teſtator *uſque primum diem Novembris Anno Regis nunc* 16. *Et hoc, &c. Unde, &c.* On which Plea in Bar the Plaintiff demurs in Law, and ſhews for Cauſe, That the Defendant had traverſed Matter not traverſable: And it was moved by *Jones* and *Saunders* of Counſel with the Plaintiff that the Plea was ill, becauſe the Defendant by his Plea with the ſaid Traverſe, hath put but Part of the Time of Service in Iſſue, *viz.* Whether the Plaintiff ſerv'd for any longer Time than from the laſt Day of *December* 1658. and ſo for all the Time before, for which the Plaintiff ought likewiſe to have a Recompence, the Defendant hath tender'd no Iſſue; and tho' the Defendant hath alledged that the Plaintiff had a Recompence for that Time, yet that ought not to conclude the Plaintiff, but he may ſay he had not any ſuch Recompence, or that the Recompence ſuppoſed by the Defendant to be given, was too ſmall: but here the Defendant by his Traverſe hath entirely excluded the Plaintiff from taking any ſuch Iſſue; and yet *Poſito* that the Plaintiff did not ſerve after the ſaid laſt Day of *December* 1658. he ought to recover for the Time he ſerved before, if he was not ſatisfied for it; but now the Plaintiff can't put it in Iſſue, whether he ſerved before, or not? or whether he was ſatisfied for ſuch Service or not, if the Defendant's Traverſe ſhall be good? and this is but an Action on the Caſe wherein Damages are to be recovered, which are deviſeable and proportionable according to the length of Time which the Plaintiff ſerv'd; and therefore the Defendant can't make one Part of the Time of the Plaintiff's Service ſerve for an Inducement to traverſe the other, as he hath here done; as in *Bulſtr.* 1 *Rep.* 116. *Yelv. Rep.* 225. An Action on the Caſe for ſtopping three Lights; the Defendant juſtified the ſtopping two, and travers'd that he ſtopp'd three; the Plea was

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ill, becauie the Inducement went but to Part, *videlieet*, two Lights only, and yet the Traverſe went preciſely to all the three, which ought not to be, becauſe if the Defendant had only ſtop'd two and not three, ; yet in an Action on the Caſe, [269] the Plaintiff ought to recover Damages *pro tanto*, but will be deluded thereof by ſuch Traverſe if it ſhould be good ; but the Defendant there ought to have pleaded *quoad* the ſtopping of one Light, Not guilty, and *quoad* the other two pleaded his Juſtification and relied thereon, and then every Part of the Injury ſuppoſed by the Plaintiff would be put in Iſſue ; ſo in this Caſe the Defendant ought to have pleaded his Matter in two Pleas, *videl'*, one Plea, thar for the Time which the Plaintiff ſerv'd *uſque ultimum diim Decembris* 1658. he had received a Recompence, *Et hoc, &c. Unde, &c.* And another Plea, *videl'*, That the Plaintiff after the ſaid laſt Day of *December* 1658. did not ſerve *modo & forma, &c. Et hoc, &c.* And ſo the whole Caſe would come in Iſſue ; but now the Traverſe hath prevented it: The Traverſe it ſelf is alſo ill for another Reaſon, *videl'* becauſe the Defendant hath preciſely travers'd the whole Time *ab ultimo Decembris* 1658. *uſque primum Novembris Anno Regis nunc* 16. whereby if the Plaintiff had taken Iſſue thereon, he ought to have proved the Service for the whole Time, or elſe he ſhould recover nothing, whereas if he had in Fact ſerv'd for any Part of the Time he ought to recover *pro tanto*; and on Iſſue joined on this Traverſe if the Plaintiff proves that he had ſerved for one, two, three or more Years, yet if he don't prove that he ſerved *uſque ad primum diem Novembr' Anno Regis nunc decimo ſexto* the Iſſue would be againſt him, tho' the Merits of the Cauſe were for him ; and for thoſe Reaſons it was concluded that the Defendant's Plea was ill ; and ſo was the Opinion of the whole Court, and Judgment was given *pro Querente*, and a Writ of Inquiry awarded. *Winnington* and *Coleman pro Defendente*, but they could not ſay much in Maintenance of the Plea.

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Lutw. 1313, 1316. Poſtea 312.

[273] *The King againſt* Sutton.

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SIR *Thomas Fanſhaw* Knight, the King's Coroner and Attorney *in Cur. Domini Regis coram ipſo Rege* exhibited an Information againſt the Defendant *Sutton*, and ſhewed that one *Elizabeth Lapworth nuper de Sowe* in the County of *War. vid. apud Sowe præd.* became *Felo de ſe* (and ſhewed how) *prout per quandam Inquiſitionem coram Johanne Yardly Gen un. Coronatorum Domini Regis Com' prædicti ſuper viſum Corporis præd. Elizabethe Lapworth nuper capt', Et in Cur. Domini Regis coram ipſo Rege per manus proprias ipſius Coronatoris deliberat' plenius liquet & apparet*, And that the ſaid Defendant *Sutton nuper de Paylton in Com' Warr. præd' indebitat. fuit præd. Elizabethe Lapworth in ſumma Octoginta librarum dicto die obitus ſui prout patet per quoddam ſcriptum Obligatorium ſigillo ipſius* (the Defendant) *ſigillat', Et hic in Cur. prolat' & geren' dat. primo die Novembr. An. Regni Regis nunc decimo quarto*; *prædictus tamen* the Defendant had not paid that Money to the ſaid *Felo de ſe* in her Life-time, whereby an Action accrued to the King [274] to demand and have of the Defendant the ſaid Sum, which he ought to be anſwerable for to the King ; and thereupon he prayed Proceſs for the King againſt the ſaid Defendant, who came in and pleaded in Bar of the Information, That by Indenture made between the ſaid late King *Charles* the Firſt of the one Part, and Sir *Simon Clark* Baronet of the other Part, one Part whereof *ſigillo Ducatus Lancaſtriæ ſigillat* he brought into Court, *Teſtatum exiſtit* that the ſaid late King granted to the ſaid Sir *Simon* the Court-Leets of *Brinklow cum Membris in Com' War. præd. necnon bona & catalla felonum & fugitivorum ibidem acciden' provenien' ſive contingen'*, *Que omnia & ſingula* were mentioned in a particular to be Parcel of the ſaid Dutchy of *Lancaſter* in the ſaid County of *Warwick*, *Habend'* for thirty-one Years not yet expired ; which Term the Defendant derived to Dame *Dorothy Clark* as Executrix to the ſaid Sir *Simon* ; And the Defendant aver'd that the Vill of *Paylton* aforeſaid is, and at the Time of the Death of the ſaid *Felo de ſe* was

2 Keb. 526, 533, 677.

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a Member of *Brinklow*; and that after the Death of the ſaid *Felo de ſe* and before the exhibiting of the Information, the ſaid Dame *Dorothy* demanded the ſaid Money of the Defendant, who payed it her, *que omnia & ſingula paratus eſt verificare*, and prayed to be diſcharged, *&c.* On which Plea the ſaid King's Attorney demur'd in Law: And now this Term *Saunders* of Counſel for the King, took ſeveral Exceptions to the Plea; (1.) That (a) the Defendant hath pleaded a Grant by the King by a *Teſtat. exiſt'*, whereas he ought to have pleaded it directly, *ſcil' quod conceſſit*, and not by a *Teſtatum exiſtit, quod conceſſit.* (2.) The Defendant hath pleaded a Grant under the Dutchy-Seal, and yet hath not aver'd in Fact that the Liberties granted were Parcel of the ſaid Dutchy, (b) and the Recital in the Indenture, *Que omnia, &c.* don't aid it, becauſe it may be a falſe Suggeſtion of the Party to deceive the King; and if the Liberties granted are not really Parcel of the Dutchy, then the Grant under the Dutchy-Seal ſignifies nothing. (c) (3.) The Defendant hath pleaded a Grant *de bonis & Catallis Felonum*; but he hath no Grant *de bonis & Catallis Felonum de ſe*; for *bona & Catulla Felonum de ſe* are a different Liberty from *bona & catalla Felonum*, and by the Grant of one, the other doth not paſs. 4. The Defendant hath not aver'd that the the Bond was at *Paylton* at the Time of the Felony committed, or at the Time of the Death of the *Felo de ſe*; and if it was not (as it ſhall not be intended it was, unleſs the Defendant had aver'd it) then the Debt was not forfeited to the ſaid *Dorothy Clark*, it not being within her Liberty: (d) for it is a Debt where the Bond is, and not where the Perſon of the Debtor inhabits. *Dyer* 305. *Daniel's* Caſe, *Cro. El.* 472. *Byron's* Caſe; But if it ſhould be a Debt where the Perſon of the Debtor inhabits then. 5. The Defendant hath not aver'd [275] that he did dwell at *Paylton*, but he is only nam'd *nuper de Paylton* in the Information, which may be true, and yet be no Inhabitant at *Paylton* at the Time of the Death of the *Felo de ſe*, when the Duty firſt accrued, wherefore the Defendant ought to have aver'd it if it was ſo: And for theſe Exceptions, but eſpecially for the third Exception, Judgment was given for the King *niſi cauſa, &c.* (e) And *Kelynge* Chief Juſtice ſaid, That if the King grants *bona & Catalla Felon' de ſe*, the Grantee ſhall not thereby have Debts due to ſuch Felons. Afterwards at another Day it was moved by Sir *Richard Hopkins* Knight, of Counſel for the Defendant, who would have ſhewn Cauſe and maintained the Plea; but the Court interrupted him, and ſaid, That it could not be made good, and thereupon Judgment was given abſolutely for the King: But *Note*, I think that if the Defendant's Counſel had excepted againſt the Information, it was not good for two Faults. (f) 1. Becauſe it is not aver'd that the ſaid *Elizabeth Lapworth* was found *Felo de ſe*, but only by a *prout per quandam Inquiſitionem, &c. liquet*, whereas according to good Pleading the Information ought to ſhew the Matter of Fact, and then that an Information was taken before the Coroner *ſuper viſum Corporis*, and ſo ſhewn the whole Subſtance thereof, and then to have concluded with a *prout, &c.* or at leaſt to have begun with the Inquiſition and ſhewn it at large, for the Inquiſition is the principal Part, and without it, no Forfeiture accrued to the King or to any other. 2. The Information ſays; That the Defendant was indebted to the *Felo de ſe* in 80 *l. prout patet* by a Bond *hic in Cur. prolat'*, whereas it ought to charge the Defendant directly, *ſcil'* that he became bound by his Bond in the Sum of 80 *l.* and not by a *prout patet*; for if the Defendant would deny the Debt, he ought not to plead that he was not indebted *modo & forma*, but his Plea is *Non eſt factum*, being charged by his own Deed; but he is not here well charged with his Deed. *Vide* for this *Plow. Com.* 143. But theſe Matters were not moved.

(a) *Where the Pleading by a* Teſtat' exiſt' *is good, and where not.* Cro. El. 195. pl. 12. 1 Sid. 375. pl. 2. Cro Jac. 383. p. 11, 537. P 4. Lutw. 535, 865, 817. Dy. 117. pl. 77.

(b) Dy. 139. pl. 36.

(c) Dy. 268. pl. 18. 1 Vent. 32. 1 Sid. 420. p. 8.

(d) Dalliſon 76, 77. Noy 54. Salk. 40. Lut. 399, 401.

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(e) D. 268. pl. 18. 12 Co. 1, 2. 1 Sid. 142. p. 17. 1 Keb. 417, 467, 497, 504. 1 Vent. 32.

(f) Dy. 139. b poſtea 355. Lutw. 1337, 1342. Plow. Com. 143. a.

[282] Duppa *Executor of* Baskervile *againſt* Mayo. [282]

DEBT for the Arrears of a Rent-Charge againſt the Defendant as Pernor of the Profits. The Plaintiff declares and ſhews, That *Robert* late Earl of *Eſſex* was ſeiſed of a Meſſuage, 200 Acres of Land, 20 Acres of Meadow, 100 Acres of Paſture and 400 Acres of Wood *cum pertin' in Bodenham Rosbury Moore Beerefield & Maund' in Com. Heref.* in his Demeſne as of Fee, and ſo ſeiſed *quarto Decembris* 43 *Eliz.* demiſed the Tenements aforeſaid to Sir *Thomas Coningsby* Knight, *Habend'* for ninety-nine Years, if *Fitz William Coningsby, Catherine* and *Urſula Coningsby. vel eor' alter tam diu viverent*; by Force of which Demiſe the ſaid Sir *Thomas Conningsby* entered and was poſſeſſed, and ſo poſſeſſed afterwards, *ſcil'* 10 *Auguſt* 1616. made his Will in Writing whereby *inter alia dedit & legavit* to Dame *Elizabeth Baskervile* (the Plaintiff's Teſtatrix) and to *Thomas Baskervile* her Son, an Annuity of 50 *l. per Annum* out of the Deviſor's demeſne Lands in *Orleton* and *Aſhwood-Park, Habend' & tenend'* the ſaid Annuity to them for their Lives, and the Life of the longeſt Liver of them (with a formal Clauſe of Diſtreſs) *Et quod poſtquam* the ſaid *Thomas Baskervile attingeret ætatem* 13 *Annor. (matre ſua vivente) tunc præd. Thomas haberet* 20 *l. annuatim de præd' deviſat.* 50 *l. pro meliori manutentione ſua durante vitæ Matris ſue, Et tunc tot. in modo ut prefertur deviſat'*, And that afterwards *ſcil'* 19 *Septembris* 1617. the ſaid Sir *Thomas Coningsby* reciting that by his laſt Will he had given ſeveral Annuities and Legacies to be paid out of his demeſne Lands, and that he had now ſold the Demeſnes in *Orleton* whereby the Legacies could not take Effect out of thoſe Lands; he for that Reaſon declar'd his Intent, *& dedit & legavit* to *Sidney Coningsby* his Son 100 Marks *per Annum ſolvend' eidem Sidney durante naturali vita ſua ex omnibus vel aliquibus maneriis Meſſuag. Terris & Tenementis que idem Thomas Coningsby tenuit per dimiſſion' Angl'* by Leaſe *in Marden Bodenham & Leominſter* in the County of *Hereford*, payable quarterly at four Feaſts, with a Clauſe of Diſtreſs if it ſhould be Arrear for twenty-eight Days after it ought to be paid, *Et ulterius idem Thomas Coningsby per ult. voluntat. ſuam præd. legavit quod præd. Elizabetha Baskervile & Thomas Baskervile haberent.* [283] *præd. Annuitatem* 50 *l. per Ann. eis deviſat' pro & duran. eor. vitis & vita cor. dintius viven' totis præd.* 50 *l. ſolvend' eidem Elizabethe Baskervile quouſque præd. Thomas Baskervile attingeret ætatem* 12 *Annor. (matre ſua vivente) & tunc* 20 *l. inde annuatim ſolvend. eidem Thome pro ejus meliori manutenentia, Et quod præd. Annuitas* 50 *l. ſoluta foret annuatim ex eiſdem maneriis Meſſuag. Terris & Tenementis præd. ad eoſdem dies & tempora in tali modo & ſuper conſimili penalitate Diſtrictionis & Forisfacture qual. in eod. Teſtamento declarata fuer. pro & concernen. præd. Annuitat.* 100 *Marcarum*; And of the ſaid Will he conſtituted the ſaid *Fitz-William Coningsby* Executor. And afterwards *ſcil' primo die Maii Anno Domini* 1618. the Teſtator died ſo ſeiſed, after whoſe Death the Executor proved the Will, and enteted into the ſaid Land and aſſented to the Legacy, and afterwards *ſcil' primo Junii Anno Domini* 1623. *Status jus Titulum & intereſſe* of the ſaid Executor *de & in premiſſis* came to the ſaid Defendant, whereby he entered and was poſſeſſed; and being ſo poſſeſſed, 250 *l.* (Parcel of the ſaid 1360 *l.*) of the ſaid Rent of 50 *l.* ſo deviſed to the ſaid *Elizabeth quouſque prædictus Thomas ætatem* 13 *annor. attingeret* for five Years ended at the Feaſt of St. *John Baptiſt Anno Domini* 1628. (during which Time the Defendant was Pernor of the Profits) were Arrear and unpaid to the ſaid *Elizabeth, poſteaque ſcil'* 24 *die Junii Anno* 1628. *ſupradicto præd. Thomas Baskervile ad ætatem ſuam* 13 *annor. attingebat*, And that 1110 *l.* Reſidue of the ſaid 1360 *l.* of the ſaid Rent of 30 *l. per Annum* ſo demiſed to *Elizabeth* after *Thomas* ſhould attain his Age of thirteen Years for thirty-ſeven Years ending at *Lady-day* 1665. (during which Term the Defendant was Pernor of the Profits) were Arrear and unpaid to the ſaid *Elizabeth* in her Life-time; and that the ſaid *Elizabeth* afterwards made her Will, and the Plaintiff her Executor, and afterwards died, the ſaid Money

2 Keb 570. [283]

not being paid, whereby an Action accrued to the Plaintiff to demand and have the ſaid Money of the Defendant, being Pernor of the Profits; *prædictus tamen, &c. Et profert literas Teſtamentarias, &c.* (a) To which the Defendant pleaded *Nil detinet*, but did not conclude to the Country, but concluded with an *hoc paratus eſt verificare, &c.* on which Plea the Plaintiff demurred: And this Term Judgment was given againſt the Defendant for the ill Concluſion of his Plea; And the Plaintiff perceiving he had miſtaken the laſt Sum, *ſcil'* the ſaid 1110 *l.* and the Time of its becoming due, he having alledged it became due for thirty-ſeven Years at *Lady-day* 1665. whereas it appears that from the Feaſt of St. *John Baptiſt* 1628. to the ſaid [284] *Lady-day* 1665. can be but thirty-ſix Years and three Quarters of a Years, and ſo he had demanded 7 *l.* 10 *s.* more than he ought; he entered a Releaſe of this 7 *l.* 10 *s.* on the Record, and entered the Judgment for the Reſidue: And afterwards the Defendant brought a Writ of Error *in Camera Scaccarii*; and the Plaintiff's Counſel in the Writ of Error took ſeveral Exceptions to the Declaration; 1. That the Action was brought againſt the Defendant only, when it appears there were other Lands liable; for it appears that the Teſtator *Coningsby* had deviſed it out of his Lands in *Leominſter*, as well as out of his Lands, whereof the Defendant was Pernor of the Profits, and ſo the Defendant ought not to have been charged alone. 2. That this Rent of 50 *l.* was jointly deviſed to the ſaid Teſtatrix *Elizabeth* and *Thomas Coningsby*, and ſo it ſurvived to the ſaid *Thomas*, wherefore the Plaintiff hath no Cauſe of Action; and altho' the Teſtator directed how it ſhould be paid, *ſcil'* 20 *l.* to *Thomas*, and 30 *l.* to *Elizabeth*; yet it was objected, That the Eſtate in the Rent was joint, and ſuch Direction will not alter the Eſtate, but is only an equitable Appointment, for which the Party grieved may have a *Subpœna*, but the Eſtate continues joint, and in Law all the Arrears became due to the ſaid *Thomas Baskervile* by Survivorſhip: But thoſe two Exceptions were over-ruled *per Curiam*: The firſt, becauſe it don't appear that the Teſtator had any other than the Leaſe from the Earl of *Eſſex*, for altho' he mentions Lands in *Leominſter*, yet it don't appear he had any there; and if the Fact had been ſo, the Defendant in the King's Bench ought to have ſhewn it by his Plea, but now it don't appear to the Court that he had any other Lands. And as to the ſecond Exception, the Court declared that it was a ſeveral Rent and not a joint Rent, for the Teſtator deviſed the entire 50 *l. per Annum* to the ſaid *Elizabeth quouſque Thomas Baskervile* ſhould attain his Age of thirteen Years (*matre ſua vivente*) and then he deviſed that the ſaid *Thomas* ſhould have 20 *l. per Annum* of this Rent of 50 *l. pro meliori Manutenentia ſua*: Now if the Teſtator had intended the Rent ſhould be joint, then that Clauſe would be abſurd; for if the Rent was joint, then *Thomas* would have 25 *l.* being the Moiety of the ſaid Rent of 50 *l.* but the Teſtator ſaid, That *Thomas* ſhould have 20 *l. pro meliori Manutenentia ſua*, but it would be *pro deteriori Manutenentia*, if the Rent ſhould be conſtrued to be joint, and therefore this Exception was likewiſe over-ruled: Then two other Exceptions were taken to the Declaration; 1. That the Plaintiff by his Declaration hath demanded more Rent, and for a longer Time than by his own ſhewing appears to be due to him, for he hath demanded 1110 *l.* for thirty-ſeven Years ended at *Lady-day* [285] 1665. whereas it appears that there can be but 1102 *l.* 10 *s.* for thirty-ſix Years and three Quarters of a Year ended at the ſame Time, and then the Plaintiff's remitting the Surpluſage after the Demurrer joined can't aid him, for by this Means the Defendant will be trick'd without any Default in him; for at the Time when he demurred he had good Cauſe of Demurrer, and by his Demurrer and the Plaintiff's Joinder, the whole Declaration was then in the Judgment of the Court, and it was too late for the Plaintiff to aid his Declaration afterwards, and therefore the Court of King's Bench ought to have given Judgment on the Declaration without any Regard to the Releaſe of the Surpluſage, and ſo the Plaintiff can't recover thereon, becauſe he hath demanded more than was due to him. 2. It appears that the Plaintiff hath demanded and had

(a) *The Concluſion of* Non Aſſumpſit infra 6 Annos, *is*, Et hoc, &c. 1 Modus Intrand. 28, 29. 2 Mod. Intr. 138, 142. Brown. lat. red. 99. Lutw. 257, 262, 948. *This ſhould be* non debet infra 6 Annos *as appears by the Plea.* 2 Saund. 63, 116, 123.

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Judgment to recover 250 *l.* of the Rent of 50 *l. per Annum* for five Years, ending at the Feaſt of St. *John Baptiſt* 1628. And the Plaintiff ſhews that the ſaid *Thomas Baskervile poſtea ſcilicet* 24 *die Junii Anno Domini* 1628. attained his Age of thirteen Years, which was the ſame Feaſt of St. *John Baptiſt*, on which the Plaintiff ſuppoſeth the ſaid 250 *l.* to be due: Then if the ſaid *Thomas Baskervile* was of the Age of thirteen Years on the ſame Feaſt of St. *John Baptiſt*, the Plaintiff ought to have demanded only 7 *l.* 10 *s.* for the Quarter ending at that Feaſt, for a Quarter of the ſaid 30 *l.* for the ſaid *Thomas Baskervile* ought to have 5 *l.* for the Rent of 20 *l.* at the ſame Feaſt; ſo the Plaintiff hath demanded and recovered 5 *l.* more than by his own ſhewing was due to him: And afterwards in *Hillary* Term 22 and 23 of the King, it was argued for the Plaintiff in the firſt Action: And as to the firſt Exception of the two laſt Exceptions, it was argued, That the Plaintiff before Judgment might well releaſe the Surpluſage, and if he had not releaſed it, yet the Court ought to have given Judgment for him for ſo much as is well demanded, and he ſhould be barred for the Reſidue; And *Godfrey*'s Caſe, *Co.* 11. 45. was cited, That (a) where a Man brings an Action for two Things, and it appears that he can't have an Action for one of them *omnino*, there the whole Writ ſhall not abate, but he ſhall have Judgment for that which the Action is well brought for, and ſhall be barred for the Reſidue; but if it appears that he may have an Action in another Form for the other Thing, then the whole Writ ſhall abate; but the Plaintiff in this Caſe can't have any Action whatever for the ſaid 7 *l.* 10 *s.* Surpluſage, for it never was due, and therefore it is within the firſt Part of the Rule of *Godfrey*'s Caſe, and there it is ſaid, That if an (b) Avowry be made for Rent, and it appears by the Party's own ſhewing, that Part of it is not yet due, yet the Avowry is [286] good for the Reſidue, and ſhall not abate wholly; ſo *Cro.* 3 *Jac.* 104. *Woodye*'s Caſe, Debt for 40 *l.* on the Statute of Uſury, and declares that the Defendant had *corruptive* lent 20 *l. Et quod contra formam Statuti* he had lent 20 *l.* more; after a Vetdict for the Plaintiff, it was adjudged for him for the firſt 20 *l.* and a *Nil capiat* for the other 20 *l.* becauſe the Plaintiff declared inſufficiently, and there it is held, That if the Defendant had demurred on the Declaration, the Plaintiff ſhould have recovered the firſt 20 *l* becauſe he had declared well, and ſhould be barred for the other; *ſo if Debt is brought againſt Executors on a Bond and a ſimple Contract together, and they demur on the whole Declaration, the Plaintiff ſhall recover his Debt on the Bond, and ſhall be barred for the Debt on ſimple Contract; ſo *Mo. Rep.* 281. *Bubby* againſt *Trevillier*, if an Avowry be for an entire Rent, and it appears that the Avowant hath Title but to two Parts of it, the whole Avowry ſhall abate; but if it appears that Part of the Rent for which the Avowry is made, is not in Arrear, the Avowry ſhall not abate, but ſhall ſtand for that Rent which appears to be Arrear; And *Hob. Rep.* 178. *Andrews* againſt *Delahay*, Bill of Debt againſt an Attorney on three Bonds, and it appears by the Condition, that one of the three Bonds is not forfeited, yet the Plaintiff ſhall have Judgment for the other two Bonds, becauſe as it is there ſaid, they are as ſeveral Demands; † And ſo *Hob. Rep.* 133. *Howell* againſt *Sambacks*. An Avowry for Rent and a *Nomine pœnæ* together, without alledging any Demand; yet on Demurrer it was adjudged that the Avowry was good for the Rent, tho' it was ill for the *Nomine pœnæ*, and the Avowant had Judgment on his Avowry for the Rent: And the Caſe of *Barber* and *Pomroy*, *Style Rep.* 175. was alſo cited; but *Hale* Chief Baron ſaid, That there was no Judgment given. And as to the ſecond Exception it was argued, That the *Poſtea* might well ſtand with the preceding Matter, for the natural Day conſiſts of twenty-four Hours and commences at Midnight, and ends the next Midnight, *Co. Litt.* 135. *a.* but the Time of Payment of Rent is at Sun-ſet, and it ſhall be then demanded, and a Tender of it afterwards comes too late; ſo the Rent in Queſtion might become due at Sun-ſet; and the ſaid *Thomas Baskervile* might afterwards and before Midnight attain the Age of thirteen Years; And it was alſo argued, That

(a) 10 Cro. 130. b. Dy. 369, 370. 1 Rol. R. 11, Kel. 15. b. 93. a. Cro Jac. 337, 11 H. 43. b. 9 H. 6. 10. b. 46 E. 54. a. 31 H. 6. 24, 25.

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48 E. 3. 5. a. 6 E. 4. 7. a.

(b) Hob. 133. Lut 1178.

* Vide Cro. El. 425, 459.

† Cro. Jac. 617.

if the *ſcilicet* was repugnant to the *poſtea* it was void, *Hob* 272. and then the want of a Day is but a Matter of Form, whereof no Advantage can be taken by the Defendant, unleſs he had demurred ſpecially: For in real and mix'd Actions the Time is never inſerted, as appears in 20 *Aſſ.* 16. *Br. Tit. Pleading* 62. And it is here ſaid preciſely that the ſaid 250 *l.* [287] were due at the Feaſt of St. *John Baptiſt* 1628. And *poſtea* the ſaid *Thomas* attained the Age of thirteen Years; and that all the Reſidue of the Rent was due *poſtquam prædictus Thomas ad ætatem ſuam* 13 *Annorum perveniſſet*; ſo it is preciſely averred and appears that the Rent was due in the ſame manner as the Declaration ſuppoſeth, and then it is not material on what Day preciſely the ſaid *Thomas* attained the Age of thirteen Years, eſpecially where the other Party hath not demurred and ſhewn it for Cauſe; (a) And 2 *Cro.* 96. *& ibidem* 429. were cited, where it appears that a *ſcilicet* ſhall be void, becauſe it is repugnant to the *poſtea*; and ſo no Day is alledged, yet it is good, for the *poſtea* is of itſelf ſufficient, altho' no Day is preciſely alledged, and the *ſcil'* is void as here; wherefore Judgment was prayed to be affirmed: But notwithſtanding the Court, *& præcipue Hale*, Ch. Baron, ſtrongly enclin'd to reverſe the Judgment for this Exception; (b) And *Hale* ſaid, That altho' Sunſet was the Time appointed by the Law to demand Rent to take Advantage of a Condition of Re-entry, and to tender it to ſave a Forfeiture, yet it is not due till Midnight; for if a Man ſeiſed in Fee makes a Leaſe for Years, yielding Rent at the Feaſt of St. *John Baptiſt*, on Condition of Re-entry for Non-payment; now the Leſſor, if he will take Advantage of the Condition, he ought to demand it at Sunſet; (c) yet if he dies after Sunſet, and before Midnight, his Heir ſhall have this Rent and not his Executors, which proves that the Rent is not due till the laſt Minute of the natural Day: And as to the other Reaſon he ſaid, That altho' the Word *poſtea* is ſufficient in any Caſe where the Party alledges it in Point of Fact only; yet here it was not ſufficient, becauſe the Plaintiff hath miſtaken the Law; for it is not ſaid *quod poſt prædictum feſtum Sancti Johannis Baptiſte Thomas* attained his Age; but it is ſaid, that *poſtea* the 250 *l.* Rent was due, *ſcilicet* on the ſame Feaſt, he attained his Age; and ſo he hath miſtaken the Law, for the Plaintiff ſuppoſeth that the Rent of 250 *l.* was due on the ſaid Feaſt, altho' the ſaid *Thomas* attained the Age of thirteen Years on the ſame Day, which is not ſo, and then his alledging it by a *poſtea*, where it judicially appears it was not *poſtea*, but that *Thomas* attained his Age *antea, ſcil'* before the Rent was due, ſignifies nothing, but is only an ill Concluſion by the Plaintiff againſt Law. But it was moved by the Court, That *Jones* of Counſel for the Plaintiff, and *Baldwyn* Serjeant for the Defendant ſhould compromiſe the Matter, to which the Parties conſented; and ſo the Matter was determined without [288] any Judgment: But *Duppa* had but 300 *l.* for all the Rent, as I heard afterwards.

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(a) Yelv. 174, 182. Cro. Jac. 549. pl. 16, 18. p. 8. Cro. El. 363. pl. 15. Salk. 325.

(b) 7 Co. 28. b. Keilw. 75. a. Lutw. 593. Cro. Jac 499. pl. 8.

(c) 10 Co. 127. b, Salk. 579. pl. 2.

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[291]

[291] Cabel *againſt* Vaughan.

1 Sid. 420. 1 Ven. 34. 2 Keb, 525, 528,

DEBT on two Bonds; The Defendant prays *Oyer* of both Bonds which are entered *in hæc verba*; and the firſt was as followeth, ℔. *Noverint univerſi per præſentes nos Johannem Vaughan Ar. Warwicum Ledgingham Ar. & Hannibal' Follett Gen. teneri & firmiter obligari Richardo Cabell Ar. in* 1600 *l. ſolvend, &c. Ad quam quidem ſolutionem bene & fideliter faciend' obligamus nos Hæred. Executores & Adminiſtratores noſtros firmiter per preſentes ſigillis noſtris ſigillat. dat', &c.* And the other Bond was in the ſame Form, and on the Entry of both Bonds *in hæc verba*, the Defendant demurred in Law on the Declaration: And it was argued for the Defendant, That the Declaration was ill, becauſe the Plaintiff hath declared againſt the Defendant only; whereas it appears on the *Oyer* of the Bonds, that they are joint Bonds, and that two others are jointly bound in the ſame Bonds, and ſo the Declaration againſt one alone ought to abate: But it was thereunto anſwered by the Plaintiffs, That the Declaration is good enough, for altho' two other Perſons

ſons are named in the Bond, yet it don't appear that they put their Seals to it, and if the Bonds were not ſealed by them, then are the Bonds ſingle, notwithſtanding two other Perſons are named therein; but if the Truth had been that the other two Perſons had ſealed the Bonds as well as the Defendant, then the Defendant, if he would have taken Advantage thereof, ought not to have demurred on the *Oyer*, (a) but ſhould have pleaded in Abatement that the other two Perſons ſealed the Bonds, and that they are yet alive, and ſo prayed Judgment of the Bill, as appears by 28 *H.* 6. 3. and *Cro. El.* 494 & 544. *Aſcue* and *Hollinſworth*'s Caſe: And the whole Court were of that Opinion, and Judgment was given *pro Querente niſi, &c.* But afterwards it was ſtayed on Pretence of an undue Proſecution by an Attorney who was concerned in the Bonds, they being Sheriffs Bonds, for Appearance, but not for the Matter in Law. *Saunders* with the Plaintiff, *Pemberton* with the Defendant.

(a) Lutw. 695, 696. *And on ſuch Plea the Plaintiff may reply, That the other Obligor is a Feme Covert or an Infant,* &c. 14 H. 4. 30. b. & 33. a. 1 H. 5. 12. b.

[294] Terrall *againſt* Shaen *Knight and Baronet.* [294]

DEBT on Bond *dat.* 24 *Maii Anno Regis nunc* 19. The Defendant prays *Oyer* of the Condition which is for the Payment of 300 *l.* on the 25 *Februar. Anno Regis nunc* 20. And on *Oyer* the Defendant pleads in Bar *Quod poſt Confectionem ſcripti obl. præd. ſcilicet* 10 *Maii Anno Regis nunc* 20. the Plaintiff *corruptive recepit* of the Defendant 30 *l. pro differendo diem ſolutionis præd'* 300 *l. pro uno Anno integro, viz. a præd.* 25 *Febr. Anno* 20 *uſque* 25 *Febr. Anno* 21 *quod eſt ultra Ratam* 6 *l. per Centum per Annum contra formam Statuti per quod ſcript. obl. præd. vacuum devenit, Et hoc, &c. Unde, &c.* Whereupon the Plaintiff demurs in Law: [295] And it was adjudged for the Plaintiff that the Plea was not good, for the new Statute of Uſury *de Anno* 12. *Caroli ſecundi cap.* 13. ſays, That *all Bonds, &c for Payment of any Principal or Money to be lent or covenanted to be performed, upon or for any Uſury whereupon or whereby there ſhall be reſerved or taken above the Rate of* 6 *l.* per Cent. per Ann. *ſhall be utterly void*; So that the Bond which ſhall be void by this Clauſe muſt be for Payment of Money *upon or for Uſury*; but here the Bond was not for Payment of Money *upon or for Uſury*, but for any Thing that appears to the contrary, was made for the Payment of a juſt Debt, and ſo the Bond was good when it was made; (a) then an uſurious Contract afterwards can't make the Bond void, which was good at the Time it was made, tho' it is true that the Plaintiff by ſuch uſurious Contract hath forfeited the treble Value by the latter Clauſe of the ſaid Statute. *Quod nota*, *Jones* and *Saunders* of Counſel with the Plaintiff,

2 Keb. 525.

[295]

(a) Cro. El. 20. 2 Mod. 307. Raym. 197. 1 Sid. 421. pl. 9. 1 Ven. 38. 1 Mod. 29. Raym. 197.

[298] Greene *againſt* Jones. [298]

Trin. 21 *Car.* II. *Regis Rot.* 1648.

TReſpaſs for an Aſſault and Battery by *Greene* againſt *Jones*, for an Aſſault and Battery committed on the Plaintiff 12 *Januar. Anno Regni Regis nunc* 20. at the Pariſh of St. *Clement Danes* in *Middleſex*, to the Damage, *&c.* The Plaintiff pleads in Bar, That before the Time when, *&c. ſcilicet* 25 *die Septembris Anno* 20. *ſupradicto* at the ſaid Pariſh of St. *Clement Danes* one *William Wood* ſued out of the King's Bench *(eadem Cur. apud Weſtm' in Com' Midd' tunc exiſten.)* a Bill of *Middleſex* againſt the Plaintiff returnable *die Veneris prox. poſt tres Sepitmanas Sancti Michaelis ult. preterit. per quod Gauden & Davies* then Sheriff of *Middleſex*, made and directed a Warrant to the Defendants to arreſt the Plaintiff according to the ſaid Bill. *per quod* the Defendant before the Return of the ſaid Bill, *ſcil'* 20 *Octobris Anno* 20 *ſupradicto* arreſted the Plaintiff; and the Defendant further ſaith, That the ſaid Plaintiff after the ſaid Arreſt, made an Aſſault on the Defendant, and he defended

2 Keb. 19. 607, 838. 844.

himſelf, ſo the Damage, if he had any, was from his own Aſſault; and traverſeth *Abſque hoc* that the Defendant is guilty at any Time before or after the ſaid 20 Day of *October Anno* 20 *ſupradicto*, *Et hoc, &c. Unde, &c.* On which Plea the Plaintiff demurs ſpecially, and ſhews for Cauſe, That it was not alledged in the Plea that the ſaid Bill of *Middleſex* was delivered to the Sheriff at any Time before the Arreſt and Aſſault, *&c.* And it was argued by *Saunders* for the Plaintiff, That the Defendant in this Caſe ought to have expreſly averred that the ſaid Bill of *Middleſex* was delivered to the Sheriff before the Arreſt, for it is a Matter which is traverſable; for the Plaintiff may reply that the Defendant made the Arreſt *de ſon Tort demeſne*, and traverſe *Abſque hoc* that any Bill of *Middleſex* was delivered to the Sheriff before the Arreſt made, and if the Matter was ſo (as it really was) the Plaintiff is excluded from taking this Iſſue by the Defendant's ill Pleading; for he hath now only ſhewn that the Bill of *Middleſex* was ſued out *per quod* the Sheriff made his Warrant, *&c.* ſo he hath alledged nothing traverſable but the (*per quod*) whereon no Iſſue can be taken; and it is out of all Controverſy, that if the Sheriff makes a Warrant to arreſt a Man, and the Bailiff arreſt
[299] [299] him accordingly, and that before any Writ delivered to the Sheriff, it is a Treſpaſs, and the Party arreſted may maintain an Action of Treſpaſs and falſe Impriſonment, altho' a Writ be delivered afterwards; yet it is a common Practice with ſome Bailiffs to arreſt and impriſon a Man, and afterwards take out a Writ, which was done in this Caſe, and therefore it was fitting it ſhould be puniſhed, and therefore he pray'd Judgment for the Plaintiff,; *Et eo potius*, becauſe the Plaintiff hath demurred ſpecially, and ſhewn the Fault of the Plea; but the Defendant would not amend it, becauſe he knew the Truth of the Matter was againſt him. *Levinz* for the Defendant, That the Plea *prima facie* was good enough, and that all the Precedents (as he ſaid) are as this is, *viz. Co. Entr.* 42, 160 *b.* 302. *a.* 304. *b.* 655. *Co.* 113. *b.* in Dr. *Bonham*'s Caſe. But *Nota*, That *Co. intr.* 42. 160. *a. & Co.* 8. 113. Dr. *Bonham*'s Caſe expreſly ſhews, That the Writ or the Warrant, *&c.* was delivered, *&c.* and the other Books don't prove much in Point of Precedents, becauſe there was no Occaſion in thoſe Caſes to ſhew the Delivery of the Writ, *&c.* as here is: He likewiſe ſaid, That the Plaintiff * ought to have replied that this Arreſt was before the Bill of *Middleſex* delivered, and then the Matters would have come in Queſtion; but the Plaintiff hath now by his Demurrer loſt the Advantage thereof. And the
Lutw. 1282, 1287. Court were of this Opinion, *ſcilicet*, That it ſhall be intended that the Bill of *Middleſex* was delivered to the Sheriff before the Arreſt, and before the making of the Warrant, and that the Plaintiff ought to have replied the contrary ſpecially, if it had not been true; for the Arreſt being after the ſuing out the Bill of *Middleſex*, and it being ſaid in the Plea that the Bill was proſecuted, *per quod* the Sheriff made his Warrant, it ſhall be intended to be delivered to the Sheriff before the Warrant made, till it is eſpecially ſhewn to the contrary, which the Plaintiff hath not done, but hath demurred, whereby he admits the Delivery of the Bill, tho' he hath ſhewn the Want of an Averment of the Delivery of the Bill for Cauſe; and the Court was ready to give Judgment *pro Defendente*; but they gave the Plaintiff Leave to amend on Payment of Coſts, becauſe the Bill really was not delivered to the Sheriff till after the Arreſt, as the Court was informed by the Plaintiff's Counſel. *Nota*, There were (in my Opinion) other Faults in the Plea, *videl'* That the Defendant alledgeth that *Wood* proſecuted the Bill of *Middleſex* out of the King's Bench 25 *Septembris Anno* 20 *Regis*, whereas it appears judicially, that the Court of King's Bench was not open nor ſitting on that Day, it being out of Term, and ſo no Bill of *Middleſex omnino* could be then ſued out. It is likewiſe ſaid, That *Wood* at the Pariſh of St. *Clements*
[300] proſecuted this Bill out of the King's Bench *apud* [300] *Weſtm'*, which is abſurd and impoſſible; but by the Overſight of the Plaintiff's Counſel, theſe Matters were not moved, which he thought a great Fault in himſelf afterwards, *&c.*

[301] *The King againſt* Opie *and* Dodge *and others by Indictment.* [301]

Trin. 21 *Car.* II. *Regis N.* 19.

INformation for an Offence in the Nature of *Embracery* againſt *Opie* and *Dodge*, and two other Defendants, for that whereas at the Aſſizes in *Cornwall* a certain Iſſue in a Plea of Treſpaſs on the Caſe between *Hoblin* an Attorney, Plaintiff, and *Richard Opie*, one of the now Defendants, then Defendant, came to be tried before the Juſtices of Aſſize; and that the Defendants before the Trial *machinaver. conſpiraver. & inter ſe illicite agreaver, per præmia & alias vias & medias illicitas* to procure a Verdict to be given for the Defendant in that Action; and to accompliſh the ſame, they contrived that the ſaid *Dodge* and *Trehane*, another of the now Defendants, for ſeveral Sums of Money, ſhould procure themſelves to be ſworn *de Circumſtantibus* for the Trial of the Iſſue; and thereupon they together with the other Jurors gave a Verdict for the Defendant in the ſaid Action, *Ad grave dampn'* of the ſaid *Hoblyn & in malum & perniciosum Exemplum omnium aliorum, &c.* And to this Information the Defendants pleaded Not guilty, and were all found guilty at the laſt Aſſizes at *Cornwal*: And now *Saunders* would have moved in Arreſt of Judgment, and he was prepared with ſeveral Exceptions; but *Hale* Chief Juſtice would not hear him; but ſaid, That the Defendants [302] might bring their Writ of Error if they would, for he would not give any Countenance to ſuch an Offence; wherefore Judgment was given againſt the Defendants, *Quod capiantur ad faciend' Finem cum Domino Rege, &c.* [302]

Nota, Tho' there was no Matter of Law determined in this Caſe, yet I have taken Notice of it for the Enormity of the Offence in ſuch ill Practices to corrupt the very Fountain of Juſtice, which are worthy ſevere Puniſhment.

[303] [303] D E

Term. Sancti Mich.

Anno Regni Regis Car. II. 21.

[306] [306] Merchant *againſt* Driver *Adminiſtrator of* Rowe.

2 Keb. 48.
1 Sid. 412.
1 Ven. 20.

Scire facias to have Execution againſt the Adminiſtrator of *Rowe de bonis propriis* on an Inquiſition retorn'd, That the Defendant *habuit bona & catalla in manibus ſuis* which were of the Inteſtate *Rowe tempore mortis ſue ad valenc. debiti & dampn.* recovered by the original Judgment; and that the ſaid Defendant *bona & catalla illa ad valenc. debiti & dampn. præd. vendidit & elongavit ac in uſum ſuum* [307] *propr. convertit & diſpoſuit.* The Defendant at the Return of the Writ came in, *Et proteſtando* that he had fully adminiſtered and had no Aſſets, for Plea ſaid *Quod ipſe non vendidit ſeu elongavit vel in uſum ſuum propr. convertit & diſpoſuit aliqua bona ſeu catalla que fuer. præd. Inteſtati tempore Mortis ſuæ modo & forma prout per Inquiſitionem præd. ſuperius ſupponitur, Et hoc, &c. Unde, &c.* To which the Plaintiff replied, That the ſaid Defendant *vendidit elongavit & ad uſum ſuum propr. convertit & diſpoſuit diverſa bona & catalla quæ fuer. præd. Inteſtati tempore Mortis ſue ad valenc. debiti & dampn. præd. prout per Inquiſitionem præd. compert. exiſtit;* and thereupon the Iſſue was joined, and a Verdict was found for the Plaintiff at the laſt Aſſizes. And now this Term *Saunders* moved in Arreſt of Judgment, That notwithſtanding the Verdict the Plaintiff can't have Judgment againſt the Defendant to have Execution *de bonis propriis*, becauſe no *Devaſtavit* is found by the firſt Inquiſition, or put in Iſſue or found by the Verdict: And then the Verdict's finding that the Defendant *vendidit elongavit & in uſum ſuum propr. convertit & diſpoſuit, &c.* don't aſcertain the Court that the Defendant hath waſted the Inteſtate's Goods; for the Defendant may *vendere elongare & in uſum ſuum propr. convertere & diſponere*, and yet commit no Waſte, nor make any *Devaſtavit*; for he may pay Debts on Judgments or otherwiſe to the Value of all the Goods with his own Money, and then he may lawfully diſpoſe of the Goods as he pleaſeth, and it is no *Devaſtavit* whereby to ſubject him to pay the Plaintiff's Debt *de bonis propriis*: And therefore the Iſſue ought to have been whether the Defendant *Devaſtavit bona & catalla* of the Inteſtate or not, which would have ended the Matter; but now the Iſſue and Verdict is nothing to the Purpoſe, wherefore he prayed that the Judgment might be arreſted. *Sed non allocatur*; for the Writ of *Scire facias* ſuggeſts that the Defendant *bona & catalla, &c. ad valenc debiti & dampn. præd' elonga-*

vit vendidit & in uſum ſuum propr. convertit & diſpoſuit ea Intentione quod dicta Executio non fieret, and therefore the Sheriff is commanded to enquire, Whether the Defendant hath done ſo or not? *Et ſi conſtaret* that he hath done ſo, *tunc per probos, &c. ſcire faceret* to the Defendant to appear and ſhew Cauſe at the Return of the Writ *quare Executio non fieret de bonis propriis*; and the Sheriff having returned that the Defendant *bona & catalla ad valenc', &c. elongavit vendidit & in uſum ſuam propr. convertit & diſpoſuit*, and the Defendant having appeared and traverſed it, which is alſo found againſt him by the Verdict, the Court will not now doubt but that the Defendant *vendidit elongavit &* [308] *in uſum ſuum propr. convertit & diſpoſuit ea Intentione quod dicta Executio non fieret*, and ſo hath done a wrongful Act in contriving and endeavouring to defraud the Plaintiff of his Debt, which amounts to a *Devaſtavit*: And it ſhall not be intended (eſpecially after a Verdict) that the Defendant hath paid other Debts of as high a Nature as the Plaintiff's to the Value of the *(a)* Inteſtate's Goods; for if it had been ſo, the Judge of Aſſize would have directed the Jury to find for the Defendant, *ſcilicet* that he had not eſloined, ſold, converted and diſpoſed to his own Uſe any of the Inteſtate's Goods *ea Intentione quod dicta Executio non fieret*; but that he had diſpoſed thereof for the Payment of other juſt Debts of as high a Nature as the Plaintiff's: And if the Truth had been ſo, the Defendant might have pleaded it, and put it in Iſſue: but he hath taken an Iſſue which he thought more fit for his Purpoſe, and the Verdict is found againſt him thereon; now the Court will not intend that he had any other Matter to plead for himſelf; and this Iſſue being found againſt him, the Court is aſcertained that the Defendant had Aſſets of the Inteſtate to the Value of the Plaintiff's Debt, but that he hath wrongfully diſpoſed thereof and eſloined them, *Ita quod dicta Executio fieri non poteſt de bon. Inteſtati*, wherefore the Court ought to award Execution *de bonis propriis*. And ſo they did, and the Plaintiff had Judgment accordingly.

[308]

(a) *The Original is Teſtator, and ſo miſprinted.*

V. 2 Saund. 402, 303, 1 Vent. 221.

[311] *The King againſt* Kilderby. [311]

Kilderby was indicted at the Seſſions of Peace in the County of *Suffolk* for uſing the Trade of a Woollen Draper at *Framlingham* in the ſame County, for three Months next before the taking of the Indictment, he not having ſerved as an Apprentice thereto, againſt the Form of the Statute of 5 *El cap.* 4 which Indictment being removed into the King's Bench by *Certiorari*, the Defendant came in and pleaded a ſpecial Plea, *viz.* That he was and is a Citizen and Freeman of the City of *London*, and that King *Henry* 3. *undecimo Januar. Anno Regni ſui* 15, by his Letters Patent under his Great Seal granted to the Mayor and Commonalty of the ſaid City and their Succeſſors, *Quod omnes Cives Civitat. præd. per totam terram, &c. libere & ſine Impedimento tam per Mare quam per terram de rebus & Merchandizis ſuis extunc imposterum negotiari poſſuit prout ſibi viderint expediri acetiam reſiderent & morarentur ubicunque voluerint infra hoc Regnum Anglie cum Mercinon. & Merchandizis ſuis emend & vendend. & pro negotiationibus ſuis conficiend'*: And he likewiſe pleaded, That the ſaid Grant, and all other Grants, Gifts and Cuſtoms of the ſaid City of *London* were ratified and confirmed by Act of Parliament *de Anno* 7 *Richardi* 2. wherefore the Defendant ſo being a Citizen and Freeman of the City of *London* for all the Time mentioned in the Indictment *apud Framlingham præd. reſidebat & morabatur cum quibuſdam Mercimon. pannar. emend. & vendend. Mercimon. pannar. præd. prout ei bene licuit juxta Conceſſion. & Confirmationem præd'*, which is the ſame uſing the Trade of a *Draper* ſuppoſed in the Indictment; and traverſed *Abſque hoc* that he did uſe the Trade of a Draper for the three Months mentioned in the Indictment *aliter ſeu aliquo alis modo quam ſic ut prefertur emend' & vendend' Mercimon pannar. apud Framlingham præd'. Et hoc, &c. Unde, &c.* On which Plea it was demurred in Law for the King: And *Saunders* of Counſel for the King argued that the Plea was ill, becauſe the Charter of King *Henry* 3. pleaded by the Defendant, is not nor can be any

1 Sid. 427. Style 223.

Diſpenſation with the ſaid Statute of 5 *El* becauſe the Statute ſays, That no Perſon ſhall uſe a Trade, *&c.* to which he hath not ſerved as an Apprentice; and this Statute was made a long Time after the ſaid Charter granted; ſo that the Charter nor the Confirmation by the ſaid Statute of 7 *R.* 2. extends not to this Point of uſing a Trade without being an Apprentice, but gives Liberty only to Citizens and Freemen of *London* to ſell their Merchandizes at any Place at their Pleaſure. And it was not the Intent of the ſaid Charter to give Liberty to uſe a Trade without being an Apprentice, [312] for two Reaſons; 1. Becauſe at Common Law, before the Statute of 5 *El.* it was lawful for any Man to uſe what Trade he pleaſed, without being an Apprentice to it; and no Man was reſtrained uſing any Craft or Trade he underſtood, altho' he never was an Apprentice, or educated or inſtructed therein; but if he committed any Miſfeaſance in the Trade which he profeſſed, the Law gave the Party grieved an Action on the Caſe againſt him; (a) as if a Smith in Shoeing my Horſe pricks him, and the like: Then at the Time of making the ſaid Charter, and at the Time of the ſaid Act of Confirmation, there was no Occaſion to grant ſuch Liberty to uſe any Trade without being an Apprentice, for every Man might lawfully do it. 2. Admitting that the Common Law had been otherwiſe, yet the Charter don't intend to grant any other Liberty, but only that the Citizens and Freemen of *London* may ſell their Merchandizes and reſide where they will, notwithſtanding ſome Cities and Boroughs claim a Liberty of excluding Foreigners from ſelling and buying Merchandizes within ſuch City or Borough, as appears *Cro. El.* 110, 352. *Dyer* 279. *b. Co.* 8. 128. And that was the ſole Intent of the Charter, as by the Words thereof it fully appears; wherefore it was concluded that the Plea was ill, and of ſuch Opinion were the whole Court. And Judgment was given *pro Rege niſi, &c.* and it was not moved afterwards *ex parte Defendentis. Nota,* I think the Plea was not well pleaded, by Reaſon the Defendant hath confeſſed the uſing the Trade of a Draper, and hath notwithſtanding traverſed *abſque hoc* that he uſed the Trade *aliter aut alio modo,* (c) which is idle and abſurd to traverſe the uſing the Trade *aliter aut alio modo*; for he was not charged by the Indictment with uſing it *aliter aut alio modo,* and therefore the Traverſe ought to be omitted; (d) The Traverſe alſo goes to the whole Time only, whereas it ought to go to every Part of the Time diſtributively; for if he hath uſed the Trade for a Month, altho' he hath not uſed it for three Months, yet he ought to be convicted thereof for the one Month, and acquitted for the other two, if the Traverſe had been rightly taken, but that was not moved. *Vide* for the Cuſtom of *London,* where one who is brought up in one Trade may follow another, *Cro. Car.* 347, 361, 516, 517.

[312] Hob. 211. 11 Co. 54.

(a) F.N.B. 24. D. 46 E. 3. 19. Fitz Action ſur le Caſe 35, 49. Br. 22. Keilw. 50. a. 48 E. 3. 6. b. (b) V. 2 Bulſt. 186. 1 Rol. R. 10. Calrorop 48. Cro. Car. 516, 517. Salk. 610.

(c) Lutw. 1371, 1379, 1560. (d) Lutw. 1313, 1316. Antea 269.

[314] Hawkſworth *and* Hillary's *Caſe.*

[314]

2 Keb. 541, 592. 1 Mod. 2.

AN Order made by the Mayor and Aldermen, the Juſtices of Peace of the City and County of *York*, at their Seſſions of Peace, was moved by *Certiorari* into this Court; whereby the ſaid Juſtices for ſundry Miſdemeanors committed by the ſaid *Hawkſworth* being Apprentice to the ſaid *Hillary* his Maſter, particularly mentioned in the ſaid Order; ſo that the ſaid Maſter did abſolutely refuſe to entertain him any longer, *Ordered that the ſaid Apprentice ſhould be diſcharged and freed from his Apprenticeſhip; and that the ſaid Maſter* Hillary *ſhould pay and reſtore to his ſaid Apprentice* 60 l. *Part of the* 100 l. *which he acknowledged he had with him; and this to be a final Order betwixt the ſaid Maſter and Apprentice, any Thing contained in the ſaid Indenture of Apprenticeſhip to the contrary in any wiſe notwithſtanding; and the ſaid Apprentice to ſtand committed till he find good Security for his Good Behaviour.* And now it was moved by *Saunders* on the Behalf of the Maſter, to have the ſaid Order quaſh'd, becauſe it is not warranted by the Statute of 5 *El. cap.* 4. one Clauſe whereof (on which this Order is founded) is as followeth. ſſ. *And if any ſuch Maſter ſhall miſuſe or evil intreat his Apprentice, or that the ſaid Ap-*

5 El. cap. 4. ſect. 35.

prentice ſhall have any juſt Cauſe to complain, or the Apprentice do not his Duty to the Maſter, then the ſaid Maſter or Apprentice being grieved, and having Cauſe to complain, ſhall repair to one Juſtice of the Peace within the ſaid County, or to the Mayor or other Head Officer of the City, Town-Corporate, Market-Town, or other Place where the ſaid Maſter dwelleth, who ſhall by his Wiſdom and Diſcretion take ſuch Order and Direction between the ſaid Maſter and his Apprentice as the Equity of the ſame ſhall require: And if for Want of good Conformity in the ſaid Maſter, the ſaid Juſtice of the Peace, or the ſaid Mayor, or other Head Officer, cannot compound and agree the Matter between him and his Apprentice, then the ſaid Juſtice, or the ſaid Mayor, or other Head Officer, ſhall take Bond of the ſaid Maſter to appear at the next Seſſions, then to be holden in the ſaid County, or within the ſaid City, Town-Corporate or Market-Town, to be before the Juſtices of the ſaid County, or the Mayor or Head Officer of the ſaid Town-Corporate or Market-Town, if the ſaid Maſter dwell within any ſuch: And upon his Appearance and hearing of the Matter before the ſaid Juſtices, or the ſaid Mayor or other Head Officer, if it be thought [315] *meet unto them to diſcharge the ſaid Apprentice of his Apprenticehood; that then the ſaid Juſtices or four of them at the leaſt whereof one of them to be of the* Quorum, *or the ſaid Mayor or other Head Officer, with the Conſent of three others of his Brethren, or Men of beſt Reputation within the ſaid City, Town-Corporate or Market-Town, ſhall have Power by Authority hereof in Writing under their Hands and Seals to pronounce and declare that they have diſcharged the ſaid Apprentice of his Apprenticehood, and the Cauſe thereof; and that the Writing ſo being made and enrolled by the Clerk of the Peace and Town-Clerk amongſt the Records that he keepeth, ſhall be a ſufficient Diſcharge for the ſaid Apprentice againſt his Maſter, his Executors and Adminiſtrators, the Indenture of the ſaid Apprenticehood, or any Law or Cuſtom to the contrary notwithſtanding. And if the Default ſhall be found to be in the Apprentice, then the ſaid Juſtices, or the ſaid Mayor or other Head Officer, with the Aſſiſtance aforeſaid, ſhall cauſe ſuch due Correction and Puniſhment to be miniſtred unto him as by their Wiſdom and Diſcretion ſhall be thought meet.* So that it appears by the ſaid Clauſe, *That for Want of good Conformity in the Maſter, ſcilicet* where the Fault is found to be in the Maſter, there the Juſtices may diſcharge the Apprentice of his Apprenticehood at their Diſcretion: *But if the Default ſhall be found to be in the Apprentice,* then the Juſtices have no Power by the Statute to diſcharge the Apprentice of his Apprenticehood, (for by this Means idle and ill-diſpoſed Apprentices will be encouraged to abuſe their Maſters, whereby they may be diſcharged of their Apprenticehoods, which will be a direct Way to their Ruin and Deſtruction:) But the Statute appoints, That the Juſtices *ſhall cauſe ſuch due Correction and Puniſhment to be miniſtred unto him, as by their Wiſdom and Diſcretion ſhall be thought meet*; whereby it appears that for Default in the Apprentice (as this Caſe in Queſtion is) the Statute don't intend that the Apprentice ſhall be diſcharged, but that he ſhould be puniſhed by the Diſcretion of the Magiſtrates till he will mend his Manners; wherefore here becauſe it appears in the Order that the Default was in the Apprentice, for which he is diſcharged of his Apprenticehood, it was prayed that the Order not being warranted by the Statute, might be quaſh'd: *Sed non allocatur*; for by the Court, It appears in the Order that the Maſter refuſed to keep his Apprentice any longer, wherefore the Juſtices made the Order of Diſcharge. (a) And the whole Court were of Opinion, That it was the Intent of the ſaid Act that an Apprentice ſhould be diſcharged of an ill Maſter, as well as the Maſter ſhould be diſcharged of an ill Apprentice; and the Clauſe which gives Power to miniſter [316] Puniſhment to an ill Apprentice, don't reſtrain but enlarge the Power of the Magiſtrates beyond what it had given them concerning Maſters; for they can't miniſter Puniſhment to Maſters for their Faults, but only diſcharge their Apprentices; but for the Faults of the Apprentices they may inflict corporal Puniſhment on them, or diſcharge them at their Diſcretion; wherefore the Order was confirmed by the Court. And afterwards in *Hillary* Term 21 & 22 *Regni Regis nunc*, it was moved again by *Jones* of Counſel with the ſaid *Hillary* the Maſter; but the Court ſaid, That the Point was ſettled in *Michaelmas* Term before, and gave the ſame Rule again, whereby the

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(a) 1 Mod. 287. 1 Vent. 175.

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the ſaid Order continued confirmed. *Note*, Theſe two Exceptions were not moved; (b) (1.) That it don't appear by the Order, that the Parties had been firſt before the Mayor of the City, or other Head Officer out of Seſſions as the Statute appoints; for they ought not to come originally to the Seſſions, but rather by Way of Appeal, as it ſeems by the Words of the Act. (c) (2.) That it don't appear that this Order was under the Hands and Seals of the Juſtices as the Act appoints. *Quære* of theſe Exceptions, for they ſeem to be material, but they were not moved.

(b) 1 Vent. 175. 1 Mod 287. Salk. 471. pl. 56
(c) Salk. 270. pl. 2.

Smith *againſt* Yeomans.

Trin. 21 *Car.* II. *Regis. Rot.* 1844.

(50) DEBT on Bond: The Defendant prays *Oyer* of the Condition, which is for Performance of Covenants contain'd in certain Indentures (made between the Plaintiff, being Sheriff of the County of *Somerſet ex una parte*, and one *Humphry Holloway Gen' Subvic'* to the ſaid Plaintiff *ex altera parte*) on the Part and Behalf of the ſaid *Holloway* to be performed: And on *Oyer* of the Condition, the Defendant pleads, That the Indentures were made between the Plaintiff and the ſaid *Holloway* at ſuch a Day and Place, and the Defendant brings one Part thereof under the Plaintiff's Seal into Court: And the Defendant further pleads, That there are not any Covenants contained in the ſaid Indenture on the Part and Behalf of the ſaid *Holloway* to be performed, *Et hoc, &c. Unde, &c.* The Plaintiff prays *Oyer* of the ſaid Indenture by the Defendant brought into Court, which is entered at large *in hæc verba*; and thereupon it appears that there are ſeveral Covenants in the ſaid Indenture contained, on the Part and Behalf of the ſaid *Holloway* to be performed; and on *Oyer* of the ſaid Indenture, being ſo entered, the Plaintiff demurs in Law on the Defendant's Plea. And now *Saunders* of Counſel with the Defendant, urg'd, That the Plaintiff hath demurred too haſtily; for, as he ſaid, the [317] Plaintiff ought to have ſhewn a Breach of one of the Covenants to maintain his Action; (a) as in Debt on Bond to perform an Award; if the Defendant pleads no Award made, it is not ſufficient for the Plaintiff to reply, and ſhew an Award made. but he ought likewiſe to ſhew a Breach thereof: So here, when the Defendant pleads there are no Covenants in the Indenture, the Plaintiff ought not only to ſhew the Covenants, but he muſt likewiſe aſſign a Breach of them: *Sed non allocatur*: But Judgment was given for the Plaintiff by the whole Court without any Difficulty. And the Reaſon ſeems to be, That when the Defendant brings the Indenture into Court, and ſaith that there are no Covenants therein, *&c.* Now on *Oyer* thereof, the Indenture is made Part of the Plea; and it thereby judicially appears to the Court that he hath pleaded a falſe Plea, and hath taken an Averment againſt the Truth of that which appears to the Court by the very Indenture which the Defendant himſelf hath brought into Court; and ſo the Plaintiff need not ſhew any Matter of Fact in a Replication to maintain his Action, as in the ſaid Caſe of an Award; but a Demurrer was more proper for the Plaintiff. *Quod nota.*

1 Mod. 15. 2 Keb. 564.

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(a) Antea 103.

Redman *againſt* Edolph.

Trin. 21 *Car.* II. *Reg. Rot.* 799.

(51.) EJectione *firmæ* brought by an Original Writ out of Chancery. And the Record on the Iſſue was entered in this Manner. ſſ. *Symo Edolph nuper de, &c. Summonitus fuit ad reſpondendum Thome Redman de placito quare vi & armis, &c.* The Defendant pleaded to Iſſue, and a Verdict was found againſt him: And it was now moved in Arreſt of Judgment,

2 Keb. 544, 583. 1 Sid. 423. 1 Mod. 3.

That here was a vitious Original not aided by any Statute of Jeofails; for as it appears by the Entry thereof the Original was a Summons, when it ought to have been an Attachment; for the Record ſaith, That the Defendant *Summonitus fuit*, whereas it ought to be *Attachiatus fuit*; And the Original Writ *in Ejectione firmæ* is an Attachment or *Pone per Vadios & Salvos Plegios, &c. in Reg brevium Original'* 227. *b.* And ſo this Caſe is not aided after Verdict. The Court asked whether the Original Writ on the File was a Summons or an Attachment? To which it was anſwered, That there was not any Search made for it; but the Record before the Court, to which they would give Credit, recites it to be a Summons, and ſo it ſhould be intended: And thereupon the Court ſtayed the Judgment, and ordered the Parties to examine the Original Writ on the File in the mean Time [318] And afterwards at another Day it was moved again, and it was ſhewn [318] to the Court that there was no Original Writ to be found on the File; wherefore it was urged by the Defendant's Counſel, That now the Court ought to intend that there was ſuch vitious Original Writ as the Record ſuppoſeth, unleſs the Plaintiff ſhews them another Original, which is good, and which may warrant the Amendment of the Record; for as the Record is, it appears that the Declaration is founded on a bad Original, and ſo no Judgment can be given for the Plaintiff: *Sed non allocatur*; * for the Court ſaid, That ſince no Original Writ is to be found on the File, they would intend after Verdict that there was once a good Original, which is now loſt; and that the Plaintiff's Clerk had miſtaken in the Recital of it, which after Verdict is not material; but if there had been a vitious Original on the File, then they would not intend any other good Original, unleſs the Plaintiff ſhewed it; wherefore the Plaintiff had his Judgment by Rule of Court. *Saunders* with the Defendant.

* Cro. Jac. 479, 675.

Bury *againſt* Biſhop.

(52.) THE Plaintiff declared on a Bond of 2000*l.* The Defendant pleaded the Statute of Sheriffs Bonds, and ſaid, That the Bond was made *pro Eaſiamento & Favore.* The Plaintiff replied, That the Bond was made for a true and juſt Debt, and traverſed *abſque hoc* that it was made for Eaſe and Favour; and the Clerk of the Papers made up the Iſſue thereon, and delivered it to the Defendant's Clerk within four Days, which is the ordinary Rule of Court to join in Iſſue, or to demur, or plead over and wave the Iſſue; and he put in a Rejoinder that the Bond was made for Eaſe and Favour, and traverſed over, *abſque hoc* that it was made for a juſt and true Debt; and this he did to delay the Trial. The Plaintiff ſummoned the Defendant's Clerk before the Secondary, who ſaid, That the Rejoinder was dilatory; wherefore the Plaintiff ſigned Judgment in *Trinity* Term laſt paſt *eo quod* the Defendant would not take Iſſue: And altho' it was moved that the Plaintiff ought not to have ſigned Judgment, but ſhould have demurred to the Rejoinder, it being put in within the Time of the Rule, and under the Hand of Counſel; for otherwiſe the Plaintiff will be his own Judge, whether the Rejoinder was good or not: Yet it was ruled *per Cur.* in this Term, That the Judgment was ſigned and entered regularly, becauſe the Secondary had adviſed the Defendant's Clerk to waive his Rejoinder, and to take the Iſſue as it was drawn by the Clerk of the Papers, which he refuſed; and the Court would not ſet it aſide. *Saunders* moved it for the Defendant. 2 Keb. 554.

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Clerke *againſt* Pywell *and others.*

2 Keb. 555.
1 Vent. 42.
1 Mod. 10.

(53.) ADjudged on a Trial at Bar *in Ejectione firmæ*, wherein the Lord *Rockingham* was concerned *ex parte defendentis*, that where a Fine *ſur Conuzans de droit come ceo* with Proclamations, was levied by the Tenant for Life; and the Leſſor of the Plaintiff in the Ejectment, who had the Reverſion for Life, within five Years after the Death of the ſaid Tenant for Life, who ſo levied the Fine, directed one to deliver the Declaration in Ejectment to the Tenant in Poſſeſſion, who did it accordingly; yet this did not amount to an Entry to avoid the Fine, tho' it was the Declaration which contained the Leaſe on which the Ejectment was brought.

Pordage *againſt* Cole.

Hill. 20 & 21 Car. II. *Reg. Rot.* 1607. *vel* 1670.

2 Keb. 533, 542.
Raym. 183.
1 Sid. 423.
1 Lev. 274.

(54.) DEBT on a Specialty for 774 *l.* 15 *s.* The Plaintiff declared, That the Defendant *per quoddam ſcriptum ſuum agreamenti fact' apud, &c.* between the Plaintiff *per nomen, &c.* and the Defendant *per nomen, &c.* and ſhewed the Deed in Court, *&c. Agreatum fuit* between the Plaintiff and Defendant *modo & forma ſequen', &c.* that the Defendant ſhould give the Plaintiff 775 *l.* for all his Lands, with a Houſe called *Aſhmole-houſe* thereunto belonging, with the *brewing Veſſels* remaining in the ſaid Houſe, with the *Malt mill and Wheel barrow*; and that in Purſuance of the Agreement aforeſaid, the Defendant had given the Plaintiff 5 *s.* as Earneſt, *Et ulterius per ſcriptum prædictum agreatum fuit* between the Plaintiff and Defendant, that the Defendant ſhould pay the Plaintiff the Remainder of the ſaid Sum of 775 *l.* a Week after the Feaſt of St *John Baptiſt* then next following (*omnia alia mobilia cum ſegete ſuper terram excepta*) *Ac licet* the Defendant had paid 5 *s. parcel', prædictus tamen* the Defendant *licet ſæpius requiſitus* had not paid the Reſidue, *ad damnum, &c.* The Defendant craved *Oyer* of the Specialty which is entered *in hæc verba* ſſ 11 *May* 1668. *It is agreed upon by Doctor* John Pordage *and* Baſſett Cole *Eſquire, That the ſaid* Baſſett Cole *ſhall give unto the ſaid Doctor 500 l. for all his Lands, with* Aſhmole-houſe *thereunto belonging, with the Brewing-Veſſels as they are now remaining in the ſaid Houſe,* [320] *and with the Malt-Mill and Wheel-barrow. In Witneſs whereof we do put our Hands and Seals, mutually given as earneſt in Performance of this 5 s. the Money to be paid a Week after* Midſummer 1668. *All other Moveables, with the Corn upon the Ground excepted* And on *Oyer* thereof the Defendant demurred: And *Withins* of Counſel with the Defendant took ſeveral Exceptions to the Declaration; (1.) That the Demand by the Declaration is of 774 *l.* 15 *s.* whereas the whole Sum is 775 *l.* And the 5 *s.* paid for Earneſt ſhall not be taken as Part of the ſaid Sum of 775 *l. Sed non allocatur*; for *per Cur.* It ſhall be intended as Part of the ſaid Sum. (2.) That the Exception of the Reſidue of the Moveables is not well recited, for the Word (*except*) in the Declaration is not good for Want of Senſe; *Sed non allocatur*; for it is ſenſible enough in the Declaration; but if it was not, yet the Declaration is good: * For an inſenſible Clauſe don't make the reſt of the Deed Vicious, which is ſenſible of it ſelf. (3.) The great Exception was, That the Plaintiff had not aver'd in his Declaration that he had conveyed the Lands, or at leaſt that he had tendered a Conveyance thereof, for the Defendant hath no Remedy to obtain the Lands; and therefore the Plaintiff ought to have conveyed them, or tendered a Conveyance thereof before he brought his Action for the Money. And it was argued by *Withins*, That if by one ſingle Deed two Things are to be performed, *ſcilicet* the one by the Plaintiff, and the other by the Defendant, if there is not mutual Remedy, the Plaintiff oughr to aver Performance on his

*9 Co. 10. 6.

Part. *Trin.* 12 *Jac. inter Holder* and *Taylor*, *Rolle* Title *Covenant* 518. *Co.* 7. 10. *Ughtred's* Caſe, and Sir *Ralph Pole's* Caſe there cited; *Co.* 5. 78, 89. *Graye's* Caſe, and that the Word (*pro*) makes a Condition in Things Executory, *Co. Lit.* 204. *a.* And here in this Caſe it is a Condition precedent, which ought to be performed before the Action brought; wherefore he pray'd Judgment for the Defendant. (a) But it was adjudged by the Court, That the Action was well brought in this Caſe, without averring the Conveyance of the Land, becauſe it ſhall be intended that both Parties ſealed the Specialty: And if the Plaintiff hath not conveyed the Land to the Defendant, he hath likewiſe an Action of Covenant againſt the Plaintiff on the Agreement contained in the Deed, which amounts to a Covenant on the Plaintiff's Part to convey the Land; and ſo *each Party* hath *mutual Remedy* againſt the other; but it might be otherwiſe, if the Specialty had been the Words of the Defendant only, and not the Words of both Parties by Way of Agreement, as here it is: And by the Concluſion of the Deed it is ſaid, That both Partſes had ſealed it; and therefore Judgment was given for the Plaintiff, which was afterwards affirmed *in Camera Scaccarii, Trin.* 22. *Caroli Secundi Regis, &c.*

1 Rol. Rep. 359.
2 Rol. Rep. 63, 64.
Cro Jac. 399 p. *in.*
3 Bulſt. 163, 136.
Godbolt 276.
Mo. 155. p. 280.

[321] Pomfrett *againſt* Ricroft. [321]

Hill. 20 *&* 21 *Car.* II. *Regis Rot.* 665.

(55.) COvenant. The Plaintiff declared, That by Indenture made between them, the Defendant had demiſed and granted to the Plaintiff a Meſſuage and a Piece of Land, containing ſo many Foot, *ſalva & excepta una parva pecia terre* lying on the South-Weſt Corner of it, whereon a Pump was ſtanding, in the Pariſh of St. *Leonard Shoreditch* in *Middleſex*, *& omnei vias paſſag', &c. ſimul cum uſu & occupatione prædictæ Antlie in Communi cum aliis tenentibus* of the ſaid Defendant *ibidem, &c. Habend* for thirty-one Years: And the Plaintiff aſſigned the Breach, That the Defendant, during the ſaid Term, did not maintain the Pump, *Sed idem* (the Defendant) *poſtea & ante finem Termini prædicti ſcilicet* 29 *die Septembris Anno Regis nunc* 16 *permiſit Antliam prædictam fore in decaſu fract' dirupt' proſtrat' & totaliter ſpoliat' ac etiam permiſit fontem & aqaam Antliæ illius cum terra fimo & ruderibus Anglice* Rubbiſh *fore replet' obſtupat' & ſpoliat' in defectu reparationis ipſius* (the Defendant) *inde ac Antliam præd. ſic in decaſu fract' dirupt' proſtrat' & ſpoliat' ac fontem & aquam Antliæ illius cum terra fimo & ruderibus ſic replet' obſtupat' & ſpoliat' a prædicto* 29 *die Septembris Anno Regis nunc* 16 *ſupradicto hucuſque remanere permiſit & exiſtunt minime reparat' manutent' ſive emendat' per quod idem* (the Plaintiff) *uſum & occupationem Antliæ prædictæ ſecundum formam & effectum Indenturæ prædictæ habere non potuit nec adhuc poteſt ſed idem* (the Plaintiff) *ratione prædict. totum uſum beneficium & Commoditat. Antliæ prædictæ per totum tempus prædictum totaliter perdidit & amiſit.* And ſo the Plaintiff ſaid, That the Defendant had broke his Covenant to the Damage, *&c.* On which Declaration the Defendant demur'd in Law: And on the Argument of *Simpſon pro Defendente & Jones pro Querente*, *Kelynge* Chief Juſtice, *Rainsford* and *Moreton* Juſtices, gave Judgment *pro Quer'*; that the Action well lay on this Ground, *viz.* That when the Uſe of a Thing is demiſed, and the Thing falls to Decay, ſo that the Leſſee can't have the Uſe and Benefit thereof, the Leſſee ſhall have an Action of Covenant for it on the Word (Demiſe) which raiſeth a Covenant in Law; and their Reaſons were *eo quod* the Leſſee himſelf can't repair it, he not having any Intereſt in the Pump or in the Land where it ſtands; for it [322] appears that the Land where the Pump ſtood was ſpecially excepted out of the Leaſe, ſo that no Intereſt therein paſſed to the Leſſee, who is the Plaintiff. Then if the Leſſor will not repair it, he not only avoids his own Grant, but the Leſſee will be likewiſe deprived of ſuch Benefit which he ought to have, and for which perhaps he was induced to give the greater Fine

1 Sid. 429.
1 Vent. 26, 44.
2 Keb. 505, 543, 569.

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Fine or Rent for a Leaſe of his Houſe, and yet he can't help himſelf; but will be wholly without Remedy, unleſs this Action of Covenant lieth: And they put the Caſe, That if a Man grants by Deed a Water-Courſe; now if the Grantor ſtops it, the Grantee ſhall have an Action of Covenant againſt him; ſo if a Leaſe be made of a Houſe and Eſtovers, if the Leſſor deſtroys all the Wood, out of which the Eſtovers were to be taken, the Leſſee have an Action of Covenant againſt him: So by *Rainsford*, if a Man by Deed demiſes a middle Room in a Houſe, and afterwards will not repair the Roof, whereby the Leſſee can't enjoy the middle Room, an Action of Covenant lies for him againſt his Leſſor; wherefore they held that the Plaintiff ſhould have Judgment. *Twyſden* Juſtice *contra totis viribus*; and that the Action here don't lie; but he agreed the Caſe before put, That where a Man grants a Watercourſe, and afterwards ſtops it, or demiſeth an Houſe and Eſtovers, and afterwards deſtroyeth the Wood; in ſuch Caſes the Party grieved ſhall have his Remedy by Action of Covenant, becauſe theſe are voluntary Acts of the Leſſor or Grantor, and a Misfeaſance in them to annul or avoid their own Grant; but in this Caſe there is no Misfeaſance, but only a Nonfeaſance, for which no Action lieth; as in the Caſe where I grant a Way over my Land, I ſhall not be obliged to repair it; but if I voluntarily ſtop it, an Action lieth againſt me for the Misfeaſance, but for the meer Nonfeaſance, *viz.* in not repairing it when it is out of Repair, no Action at all lieth: But if any Action had been maintainable, he ſaid, That it would be rather an Action on the Caſe than an Action of Covenant; as if the Leſſor enters on the Land demiſed, and fells the Timber-Trees and carries them away, whereby the Leſſee will loſe the Lops and Shade thereof, yet he can't have Covenant, but may have Treſpaſs or Action on the Caſe for his ſpecial Damage: And he likewiſe ſaid, That Covenant don't lie but for an actual Ouſter of the Land demiſed, and in ſuch Action the Poſſeſſion ſhall be recovered, as in an *Ejectione firmæ*. *Fitz.* Title *Covenant* 23. Title *Judgment* 177. And he likewiſe held, That in this Caſe the Plaintiff himſelf being the Leſſee might have repair'd the Pump; for tho' neither the Soil nor the Pump be granted him, yet by the Grant of the Uſe of the Pump the Law hath given this Liberty; for when [323] the Uſe of the Pump is granted, every Thing is granted, whereby the Grantee may have and enjoy ſuch Uſe; as if a Man give me Leave to lay Pipes of Lead in his Land to convey Water to my Ciſtern, I may afterwards enter and dig the Land to mend the ſaid Pipes, tho' the Soil is another's and not mine: But *non obſtante opinione ſua (Quæ fuit multo melior ut mihi videtur)* Judgment was given *pro Querente, ut ſupra, &c.* Afterwards *ſcilicet Hill.* 22 *&* 23 *Car. Secundi Regis*, this Judgment was revers'd *in Camera Scaccarii, per Vaughan* Chief Juſtice of the Common Pleas, *Hale* Chief Baron, *Turner*, *Tyrrell*, *Archer*, *Wylde*, and *Littleton una voce* for the Matter of Law, only for the ſaid Reaſons of *Twyſd'n*: And *Hale* ſaid, That if I lend a Piece of Plate, and covenant by Deed that the Party to whom it is lent ſhall have the Uſe of it; yet if the Plate be worn out by ordinary Uſe and Wearing without my Default, no Action of Covenant lieth againſt me.

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Perk. ſect. 111
9 E. 4. 35. a.
12 H. 8. 2. a.
11 Co. 52. a.
Cro. Jac. 122, 170.
Cro. El. 18.
Mo. 644. pl. 889.
Poph. 151.
2 Rol. Rep. 143, 152.

[326] Veale *againſt* Warner.

[326]

2 Keb. 568.

DEBT on Bond by *Veale* againſt *Warner*, *conditioned* for the Performance of an Award. On *Oyer* of the Condition, the Defendant pleads, That the Arbitrators made an Award, whereby they awarded the Defendant to pay the Plaintiff 3100 *l.* and to give the Plaintiff a general Releaſe, but he don't ſhew any Thing that was to be done by the Plaintiff (tho' in Truth they had awarded him to give the Defendant a general Releaſe) and ſo the Award, as it was ſhewn by the Defendant, was ill, being all to be performed on the Defendant's Part, and nothing on the Part of the Plaintiff: And the Defendant aver'd alſo in his Plea, That he had paid the Money, [327] and had given

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the Releaſe according to the Award, and prayed Judgment, if the Plaintiff ought to have his Action: The Plaintiff took Iſſue that the Defendant had paid the Money *modo & forma, &c. prout, &c. Et hoc petit quod inquiratur per patriam, &c.* but did not ſhew the other Part of the Award, which was omitted by the Defendant: To which Replication the Defendant put in an inſufficient Rejoinder by Way of Eſtoppel, on which the Plaintiff demur'd. And now this Term it was moved for the Plaintiff to have Judgment: And *Saunders* for the Defendant objected, That the Plaintiff could not have Judgment, becauſe it appeared by the Record that the Award was void, being all to be performed by the Defendant, and nothing by the Plaintiff; and then if the Award is void, it is not material whether the Defendant hath performed it or not, altho' he hath pleaded Performance thereof, and now he hath acknoledged the contrary by his waving the Iſſue tender'd by the Plaintiff, and Pleading an ill Rejoinder; And the Plaintiff and Defendant have both agreed, That the Award pleaded by the Defendant was the true Award made by the Arbitrators, which is altogether vitious; but if the Plaintiff would have aided himſelf, he ſhould have ſhewn the other Part of the Award before he aſſigned the Breach, which here he hath not done, and therefore he can't have Judgment: And the whole Court were clearly of ſuch Opinion, but they would not give Judgment for the Defendant, becauſe they conceived it was a Trick in Pleading; but they gave the Plaintiff Leave to diſcontinue on Payment of Coſts. And *Kelynge* Chief Juſtice, reprimanded *Saunders* for pleading ſo ſubtilly, *ex propoſito* to trick the Plaintiff by the Omiſſion of the other Part of the Award: But it was a Caſe of very great Hardſhip on the Defendant, for the Submiſſion-Bond was but of the Penalty of 2000 *l.* and the Arbitrators had awarded him to pay 3100 *l.* being 1100 *l.* more than the real Penalty of the Bond; *ubi revera* there was nothing at all due to the Plaintiff, but he was indebted to the Defendant. And the Defendant afterwards exhibited an *Engliſh* Bill *in Scaccario*, diſcovering an ill Practice of the Plaintiff with the Arbitrators, and had Relief againſt the Bond, *Et ſic materia iſta quieta fuit: Winnington* and *Simpſon* were of Counſel for the Plaintiff, but they did not perceive the Defect of the Pleading on their Part, till it was objected in Court by the other Side.

Co. 8. 98. 2 Brownl. 210. 1 Sid. 178.

[336] Hancocke *Sheriff*, &c. *againſt* Prowd *Adminiſtrator of* Yope. [336]

DEBT on Bond by *Hancocke* an Attorney againſt *Prowd* Adminiſtrator of *Yope*, on a Bond entered into by the Inteſtate: The Defendant pleaded a ſpecial *plene adminiſtravit, viz.* He pleaded that one *Wood* recovered a Judgment againſt the Inteſtate in his Life-time of 20 *l.* Debt and 30 *s.* Coſts; and that one *Clevely* recovered a like Judgment for 100 *l.* Debt and 50 *s.* Coſts; and that one *Jones* recovered a Judgment againſt the Defendant as Adminiſtrator for 160 *l.* Debt and Coſts on a Bond entered into by the Inteſtate; And that one *Orton* recovered a like Judgment againſt the Defendant as Adminiſtrator for 100 *l.* Debt and Coſts on another Bond of the Inteſtate's; and that the Inteſtate was indebted to the Defendant himſelf by Bond in 160 *l.* which he retained, and that he had not Aſſets *ultra* this Bond and the ſeveral Judgments aforeſaid, *Et hoc, &c. Unde, &c.* The Plaintiff replied *quod ipſe per aliqua preallegat' ab actione ſua prædicta habend' precludi non debet, Quia quoad* the Judgment of *Wood*, the Defendant had paid the ſaid *Wood* 12 *l.* 10 *s.* in full Satisfaction of the ſaid Judgment, and that *Wood* offer'd to acknowledge Satisfaction, but the Judgment is kept on Foot by Fraud, *Et hoc parat' eſt verificare, Et quoad* the Judgment of *Clevely*, that Satisfaction is acknowledged on Record, *Et hoc parat' eſt verificare*: And the Plaintiff further ſaid, That the Defendant had Aſſets *ultra* the two Judgments of *Jones* and *Orton*, and *ultra* his own Debt [337] aforeſaid, *Et hoc petit* [337]

1 Sid. 429. 2 Keb. 568, 535.

quod

quod inquiratur per patriam: On which Replication the Defendant demur'd generally: And *Saunders* of Counſel with the Defendant argued two ſeveral Times in this Term, that the Replication was inſufficient, and he took ſeveral Exceptions to it; 1. That the Replication was double, by Reaſon the Plaintiff had avoided two of the Judgments, *ſcilicet* the Judgment of *Wood* by Fraud, and the Judgment of *Clevely* by Satisfaction entered on Record, which are two diſtinct Matters; and the Defendant's Plea being an entire Plea, if it be void in any material Part, it is void to all Intents, and the Plaintiff ſhall have a general Judgment *de bonis Teſtatoris: Et poſito* that on two Iſſues joined it ſhould appear that Satisfaction was acknowledged on *Clevely*'s Judgment; and that *Wood*'s Judgment was not ſatisfy'd nor kept on Foot by Fraud, and ſo one Iſſue for the Plaintiff and the other for the Defendant, the Plaintiff ſhall have Judgment on the Iſſue which is found for him, altho' the other be againſt him, and therefore he ought not to tender two Iſſues, as here he hath done, when one of them is ſufficient to maintain his Action: (a) *Sed non allocatur*, for the Court thought the Replication was ſingle enough; but if it was double, yet the Defendant hath loſt the Benefit thereof by his general Demurrer. 2. He ſaid, that the Plaintiff had replied, That Satisfaction is acknowledged on Record on *Cleveley*'s Judgment, and concluded his Replication to the Country; ſo the Plaintiff would have this Matter of Record tried *per pais*, whereas it ought to be tried by the Record it ſelf, and the Defendant ought to have Liberty to rejoin to it, that there is no ſuch Record, which he is now deprived of by the ſaid Concluſion to the Country: *Sed non allocatur*; becauſe *Wood*'s Judgment being kept on Foot by Fraud, and the Satisfaction of *Cleveley*'s Judgment, and the Aſſets *ultra* the other two Judgments, and the Defendant's own Debt, are a ſeveral and diſtinct Replication, and the Plaintiff might have rejoined to them ſeverally, but he hath now demurred to them, and ſo loſt the Advantage. 3. He objected, That the Plaintiff hath in this Caſe made but one Replication, which contains three diſtinct Things, and by his Concluſion to the Country, he hath debar'd the Defendant's pleading any Plea, or taking any Iſſue on the ſpecial Matter ſhewn by the Plaintiff in his Replication; and that it is but one Replication, he ſaid appeared by the Beginning and Ending of the Replication; for at the Beginning the Plaintiff ſaith (*precludi non, &c.*) generally, and if he had intended a ſeveral Replication, he ought to have begun every of them with a *quoad* before the Words *precludi non, &c.* and concluded them ſeverally with an *hoc parat. eſt verificare unde petit judicium* [338] *& [338] debitum ſuum prædictum unacum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.* or to the Country, as the Matter required; but here there is but one Beginning and one Ending, which being ill concluded the Replication is not good: *Sed non allocatur*; for the Court ſaid, they were three ſeveral Replications, and well enough begun and concluded. 4. Then he objected, That if they ſhall be taken to be three Replications, here was a Diſcontinuance; for the Defendant hath demur'd but to one Replication, for he ſaith *Quod placitum prædictum ſuperius replicando placitat. materiaque in eodem content. minus ſufficien. in lege exiſtunt, &c.* And the Plaintiff in his Joinder in Demurrer ſaith, *Quod placitum prædictum ſuperius replicando placitat. materiaque in eodem content. bon. & ſufficien' in lege exiſtunt, &c.* So the whole is in the Singular Number, and it don't appear to which Replication the Demurrer and Joinder in Demurrer ſhall relate; but if it ſhall relate to any one of the three Replications, yet nothing is done, nor any Anſwer given to the other two, wherefore the whole is diſcontinued, being on Demurrer. *Yelv. Rep.* 65. *Middleton* againſt *Cheſman* is the Caſe in Point: *Sed non allocatur*; for the Word *placitum eſt nomen Collectivum*, and refers to all three Replications. (b) 5. It was moved, That admitting they were three Replications, yet the laſt Replication was ill, by Reaſon of the Concluſion to the Country; for the Defendant in his Plea ſaid, That he had not Aſſets beyond the two laſt Judgments and his own Debt; and therefore when the Plaintiff affirmed it in his Replication, he ſhould have concluded with an

(a) 2 Saund. 49. Salk. 298. pl. 10. 311. pl. 16.

(b) Salk. 398. pl. 10.

hoc paratus eſt verificare, &c. So the Defendant might have rejoined *quod non habuit ultra, &c.* And ſo the Iſſue would be joined, but now no Iſſue can be joined, for here is only the Plaintiff's Affirmative without any Negative of the Defendant, and yet a Concluſion to the Country, which ought not to be; for every Iſſue conſiſts of an Affirmative and a Negative: *Sed non allocatur*; for the Court ſaid, That this Replication was ſuperfluous, and the other two being ſufficient, and the Defendant having demurred to them generally, the Plaintiff ſhall have Judgment on thoſe which are material, and this laſt Replication is not to the Purpoſe; and ſo they gave Judgment for the Plaintiff; And the Court ſeemed to have a great Prejudice againſt the Defendant's Cauſe, which was the chief Reaſon of their Judgment, as I apprehend; for it ſeems clear that it was but one Replication, double and ill concluded; and if they were three Replications, then it [339] is a clear Diſcontinuance; but the Defendant having demurred generally, could not take Advantage of the Duplicity; *ſed econtra* of the other Matters. [339]

[343] Mellor *againſt* Spateman. [343]

TReſpaſs by *Mellor* againſt *Spateman*; The Plaintiff declares, That the Defendant 20 *Octobr. Anno* 20 *Regis nunc* with Force and Arms broke his Cloſe at *Derby & herbam ibidem creſcen' pedibus ambulando & cum equis bobus vaccis porcis & bidentibus depaſtus fuit conculcavit & conſumpſit & alia enormia, &c.* The Defendant as to all the Treſpaſs with any Cattle, *preterquam cum duobus ſpadonibus & duabus equabus*, pleads Not guilty: And to the ſaid Treſpaſs with the ſaid Geldings and Mares he pleads in Bar, That the Place where, *&c.* was 20 Acres of Land in *Derby præd.* and from the Time whereof, *&c.* was Parcel of a common Field called *Littlefield* in *Derby præd.* and that the ſaid Borough of *Derby* was an ancient Borough, and that the Defendant *tempore quo, &c. Et diu antea* was a Burgeſs of the ſame Borough; and the Defendant likewiſe ſays, That the Burgeſſes of this Borough from the Time whereof, *&c.* till the eleventh Day of *July Anno Regis Caroli primi decimo quarto* were a Body Politick and Corporate by the Name of Bailiffs and Burgeſſes of the Borough of *Derby*, and that on the ſaid eleventh Day of *July Anno decimo ſupradicto* the King by his Letters Patent under the Great Seal changed the Name of the Corporation to the Name of Mayor and Burgeſſes, *&c.* And then the Defendant lays a Preſcription for Common in the Corporation, *ſcil'* That the Bailiffs and Burgeſſes from the Time whereof, *&c.* to the ſaid eleventh Day of *July*, and the Mayor and Burgeſſes ever ſince had for themſelves and for every Burgeſs of the ſame Borough Common for all their commonable Cattle in the [344] ſaid Field called *Littlefield*, whereof the Place where, *&c.* is Parcel in the Manner following, *viz.* for two Years together, when the Corn is cut and carried away till the ſaid Field is reſown with Corn, and in the third Year when the ſaid Field ſhall lie freſh for all the Year: And the Defendant likewiſe avers *quod tempore quo, &c.* all the Corn growing on the ſaid Field was cut and carried away, and that no Part of this Field was reſown, wherefore the Defendant put in his Cattle to uſe his Common there, which is the ſame Treſpaſs, *&c. Et hoc, &c. Unde, &c.* On which Plea the Plaintiff demurs in Law: And the Caſe was opened in *Trinity* Term laſt, and the Court then doubted, Whether a Preſcription for Common in Groſs was good or not? And now this Term it was argued by *Saunders* for the Defendant, That the Preſcription was good; (a) And firſt he ſaid, That it was clear that a Corporation by the Change or Alteration of the Name of the Corporation don't loſe their Franchiſes. *Lutterell's* Caſe, *Co.* 4. 87. *Quod fuit conceſſum, &c.* * Then he ſaid, That a Corporation may preſcribe for the Benefit of their particular Members, as well as a natural Perſon may preſcribe for Common or other Profit or Eaſement for himſelf and his Tenants; for tho' a Corporation aggregate (as here) is a Thing in Imagination only, having neither Body, Spirit nor Knowledge, as the Law defines it; yet the Law [344]

1 Mod. 6. 2 Keb. 527, 550, 570.

22 Aſſ. 42.

(a) 21 E. 4. 55' a. 14 H. 6. 12. b 4 Co. 37. b. 38. a. *Dy. 279. b. Mo. 581, 582. 2 Lev. 238.

Law takes Notice, that the natural Perſons, Members of the Corporation, of whom the Corporation conſiſts, are not Strangers to the Corporation; but that they are the Parties intereſted in all the Revenues and Privileges of the Corporation, whereof they are Members; (b) and therefore if a Corporation brings an Action for any Thing which they claim in their corporate Capacity, it is a principal Challenge to a Juror that he is of Affinity to any Member of the ſame Corporation, tho' the Corporation of it ſelf can't have any Kindred. (c) *Co. Lit.* 157. *a.* (d) And that a Corporation may take a Grant for the Benefit of their particular Members, appears by the Book of 48 *E.* 3. *fo.* 17. *b.* The Mayor and Corporation of *N.* brought an Action of Covenant againſt the Mayor, Bailiffs and Commonalty of *Derby*, and declared, That the Defendants Predeceſſors by their Deed granted the Plaintiffs Predeceſſors, that all the Commonalty of *N.* ſhould be quit of Murage, Pontage, Cuſtom and Toll within the City of *Derby*, of all their Merchandizes, *&c.* And that the Officers of *Derby* had taken Toll and Cuſtom of ſome of the Burgeſſes of *N.* wrongfully and againſt the Covenant, to their Damage, *&c.* And the Action was adjudged good; and that was a Grant to a Corporation for the Benefit of their [345] particular Members: Then if a Corporation may take a Grant for the Benefit of their particular Members, they may preſcribe to have the ſame Thing to the ſame Intent, for whatever may commence by Grant, may be claimed by Preſcription; and if ſuch Common as the Defendant hath here claimed, had been at this Day granted to the Corporation, it would have been good without Doubt; and ſo he ſaid is the Preſcription in the Manner it is here made; which the Court did not much deny: But the Point on which the Court inſiſted was, That there can't be any Common in Groſs without Number; but the Preſcription in the Caſe at Bar ought to be for Cattle levant and couchant within the City; for otherwiſe (the Chief Juſtice ſaid) the Corporation may ſurcharge the Common, unleſs the Number of the Cattle were reſtrained to be levant and couchant in the ſame City: Whereupon it was ſaid for the Defendant, That in *Co Lit.* 122. *a.* in the Enumeration of the ſeveral and particular Kinds of Common, Common in Groſs without Number is expreſly ſaid to be one; and 22 *Aſſ. placito* 36. An Aſſize was brought by the Prioreſs of *Napleton* for Common in Groſs without Number, and ſhe recovered; and there the Difference is ſhewn between Common in Groſs and Common Appendant or Appurtenant: So 11 *H.* 6. 22. *b.* & 27. *Stroade's* Caſe, Common in Groſs without Number is claimed by Preſcription and admitted good; and 15 *E.* 4. 29. *b.* The City of *Coventry's* Caſe, that a Corporation may preſcribe for Common in Groſs without Number: And as to the Objection of Surcharge, it was anſwered, That altho' a natural Perſon or a Body Politick hath Common in Groſs without Number, yet they can't by Law ſurcharge the Common, as appears 12 *H.* 8. 2. *Br.* Title *Common* 49. where 'tis ſaid, That if a Man hath Common without Number, yet he cannot ſo ſurcharge the Soil, but that the Lord or Proprietor of the Soil may have Common there alſo. And tho' *F. N. B.* 125. *d.* ſaith, That if a Man hath Common in Groſs without Number, it ſhall not be admeaſured, yet if he ſurchargeth, the Lord of the Soil may diſtrain, as it may be collected out of the ſame Book; and this Common in the Caſe at Bar is Common in Groſs and not Appendant or Appurtenant; and therefore it is not proper to preſcribe for Common for Cattle levant and couchant in the ſame City, for then the Preſcription will run in this Manner, *viz.* That the Corporation are ſeiſed of the City, and that they and all thoſe whoſe Eſtate they have in the ſame City have had Common, *&c.* for their Cattle levant and couchant within the ſame City; but they can't preſcribe ſo here, but they preſcribe for Common in Groſs without annexing it to any Land; and the Preſcription for Common [346] Appurtenant and Common in Groſs without Number in a natural Perſon, is very different; for, for Common Appurtenant a Man ſhews his Seiſin in Fee of Land to which he claims his Common, and then ſays *Quod ipſe & omnes illi quorum ſtatum ipſe habet* in the ſame Land, from time

(b) 28 Aſſ. 18. 34 Aſſ. 6. 7 E. 44. b. 17 E. 4. 7. a. 21 E. 4. 20. b 28 H. 6. Po. a. (c) 1 Rol. R 135, 142.

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12 H 8. 2. a.

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time whereof, *&c. habuit Communiam* of Paſture in the Place where *&c, pro averiis ſuis* levant and couchant on the Land, to which, *&c.* But the Preſcription for Common in Groſs is, where one lays no Seiſin of any Land, but ſays, *Quod ipſe & omnes anteceſſores ſui quorum heres ipſe eſt*, from Time whereof, *&c.* have Common in the Place where, *&c. pro omnibus averiis ſuis*, without referring to any Land, and without ſaying levant and couchant, becauſe there is no Land on which they may be levant and couchant, or to which the Common can be appurtenant: And as a natural Perſon preſcribes in himſelf and his Anceſtors, ſo if a Corporation have been a Corporation aggregate from Time whereof, *&c.* they may preſcribe in the Manner as they have here done; and ſo the Preſcription here for the Corporation for Common in Groſs is as it ought to be; but if they had claimed Common appurtenant, it ought to have been otherwiſe; for then they ought to have ſhewn a Seiſin of Land in Fee, and preſcribed to have Common for their Cattle levant and couchant on ſuch Land; wherefore he concluded, That the Preſcription for Common in Groſs without Number, was good. *Bigland econtra*, and he inſiſted, That the Defendant ought to have ſaid in the Preſcription, that the Common was for Cattle levant and couchant within the City; and ſo was the Opinion of the whole Court, and they relied much on the Book of 15 *E.* 4. 32. *b.* And the Court did not miſlike any Part of the Plea; but only that it was not ſaid in the Plea levant and couchant within the City And *Kelynge* Chief Juſtice, ſaid poſitively, That there could not be any Common in Groſs without Number; but all held the Plea was ill for Want of the ſaid Words, and Judgment was given for the Plaintiff: And *Kelynge* ſaid, That they did not deſtroy the Common, but the Judgment was for the Fault in the Plea only, and advertiſed the Defendant and his Counſel, that if they had put in the Words *levant and couchant within the City*, the Preſcription in the Manner aforeſaid would have been good. And the Defendant's Counſel was of Opinion to bring a Writ of Error, but the Action being commenced by Original out of Chancery, and *ideo* a Writ of Error lay not *in Camera Scaccarii* by the Statute of 27 *El. cap.* 8. but only in Parliament; *per quod nil ulterius factum fuit.*

2 Saund. 4. 1 Sid. 462. 2 Keb. 658. pl. 4. 1 Sid. 313, 314. 2 Keb. 138, 120. 1 Lev. 196. 1 Mod. 6, 7. Show. 187.

[350] Potter *againſt* North. [350]

REplevin by *Potter* againſt *North* for taking and detaining the Plaintiff's Nagg 18 *Junii Anno Regis nunc* 19. *apud Mildenhall* in *Suffolk*, in a Place there called the *Fenn*, *&c.* The Defendant makes Conuzance as Bailiff to Sir *Henry North* Baronet, becauſe he ſays the Place called the *Fenn* contains 1000 Acres of Paſture, whereof a Place called the *Delfe*, containing 100 Acres, is and *a tempore cujus*, *&c.* hath been Parcel, which is the Freehold of the ſaid Sir *Henry North*, wherefore he took the Nag there Damage Feaſant, *&c.* The Plaintiff pleads in Bar to the Conuzance, and confeſſeth that the Place called the *Delfe* is Parcel of the ſaid *Fenn*, and that it was the Freehold of the ſaid Sir *Henry*: But he further ſaith, That the ſaid 100 Acres called the *Delfe* is, and from Time whereof, *&c.* was, Parcel of the Manor of *Mildenhall*, whereof the ſaid Sir *Henry* was ſeiſed in Fee; and that the Plaintiff *præd' tempore quo*, *&c.* was ſeiſed of an ancient Meſſuage *cum pertin. in Mildenhall exiſten' uno liberorum Tenementor. Manerii præd. & tent. de eodem Manerio* by Rents and Services, in his Demeſne as of Fee: And that there are, and from Time whereof, *&c.* have been, divers ancient Meſſuages, being Freehold Tenements held of the ſaid Manor in Fee-ſimple by Rents and Services, Parcel of the ſaid Manor; and that there are and from Time whereof, *&c.* have been, ſeveral ancient Meſſuages, being cuſtumary Tenements of the ſaid Manor, grantable by Copy of Court-Roll; and then the Plaintiff lays a Preſcription, That the Tenants of the ſeveral Freehold Tenements being ſeiſed of the ſaid Tenements in their Demeſne as of Fee, *Et omnes illi quor. Statum ipſi ſeperaliter habent in eiſdem a toto tempore ſupradicto habuer. ſimulcum Tenentibus præd' Cuſtumar. Meſſuag. ſolum & ſeperalem paſturam* [351]

1 Ven. 383. Cart. 199. Vaugh 251. 2 Saund. 324. 1 Lev. 268, 252. 2 Keb. 513, 517.

[351] *ſturam præd.* 100 *Acrarum paſture* [351] (being the Place called the *Delfe*) *pro omnibus averiis ſuis (porcis ovibus & juvencis vocat.* Northern Steers, *exceptis*) levant and couchant on their reſpective Freeholds, *quolibet anno ad omnia tempora anni tanquam ad eorum ſeperalia libera tenementa ſpectan. & pertinen'*: And moreover he layeth a Cuſtom within the ſaid Manor, *Quod ſeperales Tenentes prædictorum Meſſuagiorum cuſtumariorum ſimulcum prædictis liberis tenentibus habere uſi fuer. & conſuever. ſolam & ſeperalem paſturam prædictarum Centum acrarum Paſture,* being the Place where, *&c. pro omnibus averi ſuis (porcis ovibus & juvencis vocat'* Northern Steers, *exceptis*) levant and couchant on the ſeveral cuſtumary Tenements, *quolibet anno, ad omnia tempora anni tanquam ad eorum ſeperalia Tenementa Cuſtumaria ſpectan. & pertinen'*: And the Plaintiff ſaith further, That he being ſo ſeiſed of his ſaid Meſſuage, put in his Nag aforeſaid, which was levant and couchant, *&c. ad herbam ibidem creſcen. depaſcend'*, and that afterwards, *ſcilicet tempore quo, &c.* the Defendant unjuſtly took and detained it, as he had before declared, *&c.* On which Bar to the Conuzance, the Defendant demurred in Law. And it was argued by *North* the King's Counſel, for the Defendant, That the Bar was not good for ſeveral Reaſons; 1. That the free Tenants and Copyholders can't join in claiming an entire Intereſt. 2. That an entire Thing can't be claimed by Preſcription and Cuſtom together, as here it is; for the Grant to free Tenants and the Uſage of Copyholders can't commence together. 3. That the Owner of the Soil can't be wholly excluded. 4. That this is a new Invention to exclude the Lord from his own Soil; for altho' he may be ſtinted, as in *Yelv.* 129. yet he can't be wholly excluded at all Times, but only for a certain limited Time, *&c.* as in the Books of *Hutt. Rep.* 45. 3 *E.* 3. 29. 30. 15 *E.* 2. *Preſcription* 51. 46 *E.* 3. 43. *Co. Litt.* 122. 5. It is contrary to the Nature of Common or Feeding to be appendant or appurtenant to an Houſe, but it ought to be appendant or appurtenant to Land: For an Houſe is for the Habitation of Men, and not for Cattle levant and couchant upon it; and Common or Feeding is to be taken by the Mouth of Cattle levant and couchant on Land, and not on an Houſe; but true it is, that a Man may preſcribe for Common in Groſs, but then he ought not to preſcribe for Cattle levant and couchant in any Place. 1 *Inſt.* 121. *b.* 6. By this Preſcription and Cuſtom, the Lord will be entirely excluded, and the Land may lie Waſte to the Prejudice of the Commonwealth: For the Tenants by their own Preſcription and Cuſtom,

[352] [352] claim not the ſole Paſture, but for certain Cattle to be levant and couchant on their Meſſuages; and if there be no ſuch Cattle in any Year, then the Land will lie Waſte, for the Lord can't intermeddle, and the Tenants can't have the Herbage but by the Mouth of their Cattle levant and couchant, *&c.* Here if they have not Cattle ſufficient to feed the whole Paſture, the Reſidue will be Waſte; and therefore the Preſcription and Cuſtom are ill; for a Preſcription for ſole Paſture for all the Year ought to be generally for all Cattle, and not reſtrained to any limited Number; but it is otherwiſe of Common, for there the Levancy and Couchancy is the Standard or Mete-wand of the *Quantum* of Common, and is but Part of the Herbage, and the Lord hath the Reſidue: But where the whole Herbage is claimed, it would be abſurd to limit it to any certain Number or Sort of Cattle; for by this Reaſon all the Herbage may be claimed for two or three Cattle only, whereas if any Number of Cattle, how great ſoever, be put in, the Lord hath no Injury done him, his Tenants having the ſole Paſturage for the whole Year: But if ſole Paſturage be claimed for a certain Time only, then ſuch Graſs as is not depaſtur'd by theſe Cattle is left for the Benefit of the Lord. 7. That this Preſcription is not good, becauſe it can't commence by Grant at this Day; for it is contrary to the Nature of a Grant to grant an entire Thing, and yet to reſtrain the Grantee from uſing it; as here to grant a Man the whole and ſole Paſturage for all the Year, and yet to reſtrain the Grantee that he ſhall not have it but by the Mouths of Cattle levant and couchant on his Meſſuage, and by no other; and then if the Grantee hath not ſuch Cattle levant and couchant, he loſeth the Benefit of his Grant, and yet the Grantor ſhall not have it, but the Paſturage ſhall be utterly loſt to

the Prejudice of the Commonwealth; and then if it can't be good by Grant, it can't be good by Preſcription; and ſo the Preſcription is ill: And much more was ſaid to prove that the Bar was not good. *Coleman* of Counſel with the Plaintiff argued, That the Bar to the Conuzance was good; and ſaid, That the ſaid Preſcription and Cuſtom might have a good Commencement; for it was firſt the Uſage of the Copyholders, which don't exclude the Lord, and then the Grant of the Lord to the Freeholders, whereby he granted them the ſole Paſturage *ſimulcum* the Copyholders, and excluded himſelf, and ſo the Preſcription commenced at firſt: And he further ſaid, That tho' the ſole Paſturage be reſtrained to be taken by the Mouths of Cattle levant and couchant, which *prima facie* ſeems to be but a meer Common, yet that is only Evidence of a Common; and [353] the Defendant having demurred thereunto, hath confeſſed the Truth, as the Plaintiff hath alledged it, that it is a ſole Paſture; and it ſhall not be intended but that the Cattle levant and couchant, *&c.* are ſufficient to depaſture all the Herbage, and then the Preſcription is reaſonable enough: And it was well argued by him, and he cited a Caſe in this Court, *Trin.* 1654. *Rot.* 549. where a Man claimed a Fold-Courſe, and excluded the Owner of the Soil by Preſcription, and adjudged good: And the Court here ſeemed to incline, that the Plea and Preſcription were good; but they directed a Trial at Bar to try the Truth of it, to which the Parties conſented; and afterwards *in Termino Paſchæ* a Trial was had at Bar; but the Tenants could not prove their Title to be as they had alledged it, and the Lord had a Verdict; and ſo no Judgment was in this Caſe on the Demurrer.

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1 Rol. 401, 403. 1 Inſt. 122. a. 2 Lev. 2.

[361] Toomes *Adminiſtrator of* Toomes *againſt* Etherington.

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Scire facias by *Toomes* Adminiſtrator of *Toomes* againſt *Etherington*, to have Execution of a Judgment for 2000 *l.* and 21 *s.* Damages, recovered by the Inteſtate againſt the Defendant *Etherington*: The Defendant pleads in Bar of the Execution, That the ſaid *Toomes* the Inteſtate, after Judgment given, hang'd himſelf, and became *Felo de ſe*; and that by an Inquiſition taken before the Coroner *ſuper viſum Corporis* he was found *Felo de ſe prout per eandem Inquiſitionem* returned in the King's Bench *& ibidem de recordo reſiden'*, *plenius apparet*, whereby the ſaid *Toomes* the Inteſtate had forfeited the ſaid Debt and Damages to our Lord the King, *Et hoc, &c. Unde, &c.* The Plaintiff replies, That after the ſaid Inteſtate became *Felo de ſe, ſcilicet*, at a Parliament held the twelfth Year of the Reign of the King that now is, it was enacted, *&c.* and ſhews Part of the Act of Oblivion *de Anno duodecimo Caroli Secundi, cap.* 11. *That all and every the Subjects of theſe his Majeſty's Realms of* England *and* Ireland, *the Dominion of* Wales, *the Iſles of* Jerſey *and* Guernſey, *and the Town of* Berwick *upon* Tweed, *and other his Majeſty's Dominions, the Heirs, Executors and Adminiſtrators of them and every of them, ſhall be, and are by the Authority of this preſent Parliament, acquitted, pardoned, releaſed, indempnified and diſcharged againſt the King's Majeſty, his Heirs and Succeſſors, and every of them, of and from all manner of Treaſons, Miſpriſions of Treaſon, Felonies, Offences, Contempts, Treſpaſſes, Entries, Wrongs, Deceits, Miſdemeanors, Forfeitures, Penalties and Sums of Money, and of and from all Pains of Death, Pains Corporal and Pecuniary, and generally of and from all other Things, Cauſes, Quarrels, Suits, Judgments, and Executions in this preſent Act hereafter not excepted nor forepriſed, which may be or can be by his Majeſty in any wiſe, or by any Means pardoned, before and unto the twenty-fourth Day of* June, *in the Year of our Lord, One thouſand ſix hundred and ſixty, to every or any of his ſaid Subjects. And alſo the King's Majeſty is contented that it be further enacted by the Authority of this preſent Parliament, And be it enacted by the Authority aforeſaid, That this his ſaid free Pardon, Indempnity and* [362[*Oblivion ſhall be as good and effectual in Law to every of his ſaid Subjects, in, for and againſt all Things which be not hereafter in this preſent Act excepted and forepriſed, as the ſame Pardon,*

1 Sid. 167, 364. 2 Keb. 921. 1 Lev. 130.

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Pardon, Indempnity and Oblivion ſhould have been, if all Offences, Contempts, Forfeitures, Cauſes, Matters, Suits, Quarrels, Judgments, Executions, Penalties, and all other Things, not hereafter in this preſent Act excepted and forepriſed, had been particularly, ſingularly, eſpecially and plainly named, rehearſed and ſpecified, and all pardoned by proper and expreſs Words and Names in their Kinds, Natures and Qualities, by Words and Terms thereunto requiſite to have been put in and expreſſed in this preſent Act of Free Pardon, Indempnity and Oblivion: And that his ſaid Subjects, nor any of them, nor the Heirs, Executors or Adminiſtrators of them, or any of them, be or ſhall be ſued, vexed or inquieted by or on the Behalf of the King's Majeſty, his Heirs or Succeſſors, in their Bodies, Goods, Chattels, Lands or Tenements, for any manner of Matter, Cauſe, Contempt, Miſdemeanors, Forfeitures, Treſpaſs, Offence, or any other Thing ſuffered, done or committed before the ſaid twenty-fourth Day of June, *One thouſand ſix hundred and ſixty, againſt his ſaid Majeſty King* Charles, *or his Majeſty that now is, his Crown, Dignity, Prerogative, Laws or Statutes, but only for ſuch Matters, Cauſes and Offences as be excepted and forepriſed by this preſent Act out of the ſame, any Statute or Statutes, Laws, Cuſtoms or Uſages heretofore had, made or uſed to the contrary in any wiſe notwithſtanding.* By Force of which Act of Pardon, the Plaintiff ſaith, The ſaid 2000 *l.* 21 *s.* are diſcharged of any Forfeiture for the ſaid Offence of *Felo de ſe*, and prays Execution againſt the Defendant, and avers that the ſaid *Toomes* the Inteſtate *tempore mortis ſuæ* was a Subject of the King-
(a) 1 Lev 26. dom of *England*, and that neither the Inteſtate nor the Plaintiff were (a) excepted out of the ſaid Act, *Et quod crimen Feloniæ de ſe* is not excepted out of the ſaid Act, *&c.* On which Replication the Defendant demurs in Law: And after ſeveral Arguments, Judgment was given for the Defendant in *Mich'* Term *decimo quinto Caroli Secundi Regis*: And the chief Reaſon of the Judgment was, That when the Inquiſition was returned in the King's Bench which found the *Felony de ſe*, then was the Debt and Damages veſted in the King, and he hath not by the Act granted Reſtitution thereof to the Plaintiff, being the Adminiſtrator of the *Felo de ſe*; for the Pardon is not ſufficient to reveſt the Debt, *&c.* in the Adminiſtrator, but there ought to be a Reſti-
[363] tution after [363] the Debt is once veſted in the King: And for want of Reſtitution the Plaintiff can't have it, but it remains in the King; and that was the principal Reaſon of the Judgment. But *Nota*, That the King had formerly brought a *Scire facias* againſt the Defendant to have Execution of this very Judgment, who pleaded the ſaid Act of Pardon with the uſual Averments, and it was adjudged againſt the King, and that the Debt was releaſed and pardoned to the ſaid Defendant *Etherington* by the ſaid Act; and ſo the Creditors of *Toomes* loſt their Debt, and his Debtors were pardoned by the ſaid Act, which was a miſchievous Caſe; and therefore the Plaintiff the Adminiſtrator brought a Writ of Error on this Judgment in Parliament, which was to be argued this Term; but his Counſel deſpaired of reverſing the Judgment for the Matter in Law; and *Etherington* the Defendant gave a ſmall Sum of Money to the Plaintiff, *Et ſic iſta materia dormivit, &c.*

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THE Court of B. R. judicially takes Notice of the Proceis of the Grand Sessions of *Wales*, and of the Customs in *Wales*, 74

Will.

Vide Devise.

FINIS.